TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1936

No. 247

EDWARD T. BLAIR, PETITIONER,

vs.

COMMISSIONER OF INTERNAL REVENUE.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR CERTIORARI FILED JULY 31, 1936.

CERTIORARI GRANTED OCTOBER 12, 1936.

SUPREME COURT OF THE UNITED STATES

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vs.

COMMISSIONER OF INTERNAL REVENUE

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[fol. 1]

BEFORE UNITED STATES BOARD OF TAX APPEALS

Docket No. 42313

EDWARD T. BLAIR, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent

Appearances:

For Taxpayer: J. F. Dammann, Jr., Esq., C. F. Selfridge, Esq.

For Comm'r: John M. Morawski, Esq., B. A. Low, Esq.

DOCKET ENTRIES

1929.

Jan. 14. Petition received and filed. Taxpayer notified. (Fee paid.)

Jan. 15. Copy of petition served on General Counsel.

Feb. 15. Answer filed by General Counsel.

Mar. 9. Copy of answer served on taxpayer. General Calendar.

1931.

Oct. 10. Hearing set Dec. 14, 1931.

Oct. 21. Motion for 90 days' continuance filed by taxpayer. 10/23/31 granted to March 7, 1932.

1932.

Mar. 7. Hearing had before Mr. Murdock on respondent's motion to continue pending decision of docket 24684 in Circuit Court of Appeals. Granted and continued to May 9, 1932.

Mar. 7. Order that proceedings be continued to Day Calendar of May 9, 1932 entered.

May 6. Motion for continuance to Fall Calendar 1932 filed by General Counsel. 5/7/32 granted.

Sep. 12. Hearing set Oct. 25, 1932.

Oct. 7. Motion to place on the Reserve Calendar filed by General Counsel. 10/10/32 granted to Reserve A.

DOCKET ENTRIES—Continued

1933.

Mar. 29. Motion to restore to the Board's Day Calendar filed by General Counsel. 4/3/33 granted.
Apr. 5. Hearing set May 8, 1933.

[fol. 2]

Apr. 7. Motion for circuit hearing at Chicago filed by taxpayer. 4/10/33 granted.
Jul. 24. Hearing set week of August 28, 1933 at Chicago, Illinois.
Sep. 5. Hearing had before Mr. McMahon, Div. 16 on merits. On motion for continuance, taken C. A. V. Consolidated with docket 63741. Stipulation of facts filed. Petitioner's brief on motion to continue due 10/1/33.
Sep. 18. Transcript of hearing of 9/5/33 filed.
Oct. 2. Brief filed by taxpayer.

1934.

Apr. 18. Order that proceedings be restored to Day Calendar of May 2, 1934 for hearing pursuant to stipulation of facts filed Sept. 5, 1933 entered.
May 2. Hearing had before S. J. McMahon, Div. 16. Submitted on merits. No briefs. Further hearing.
May 14. Transcript of hearing of May 2, 1934 filed.

1935.

Jan. 31. Findings of fact and opinion rendered, S. J. McMahon, Div. 16. Decision will be entered under Rule 50.
Mar. 1. Notice of settlement filed by General Counsel.
Mar. 4. Hearing set March 20, 1935 under Rule 50.
March 19. Consent to settlement filed by taxpayer.
Mar. 22. Decision entered, S. J. McMahon, Div. 16.
Jun. 12. Petition for review by U. S. Circuit Court of Appeals (7) with assignments of error filed by General Counsel.
Jun. 27. Proof of service filed by General Counsel.
Aug. 1. Motion for extension to Sept. 12, 1935 to prepare and transmit record filed by General Counsel.

DOCKET ENTRIES—Continued

1935.

Aug. 1. Order enlarging time to Sept. 12, 1935 to prepare and transmit record entered.

Sep. 9. Agreed statement of evidence lodged by General Counsel.

Sep. 9. Præcipe with proof of service thereon filed by General Counsel.

Sep. 12. Order that time for preparation of evidence and delivery of record be extended to Nov. 1, 1935 entered.

Oct. 2. Order that clerk of the Board be directed to omit any statement of evidence in the record to be transmitted by him to the U. S. Circuit Court of Appeals for the 7th Circuit, entered. (See memorandum attached.)

[fol. 3] BEFORE UNITED STATES BOARD OF TAX APPEALS

* * * (Caption—No. 42313) * * *

PETITION—Filed January 14, 1929

The above named Petition hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his Notice of Deficiency IT:AR:B-12 PL-60D dated November 16, 1928, and as a basis of his petition alleges as follows:

(1) Petitioner is an individual with residence at 1516 Lake Shore Drive, Chicago, Illinois.

(2) The Notice of Deficiency, a copy of which is attached and marked Exhibit "A," was mailed to the Petitioner on November 16, 1928.

(3) The taxes in controversy are income taxes for the calendar years 1924, 1925 and 1926. The amounts in controversy are

1924	$7,642.52
1925	10,399.94
1926	12,876.36

(4) The determination of the tax set forth in said Notice of Deficiency is based on the following errors:

(a) The Commissioner of Internal Revenue erred in including as income of this Petitioner

$30,000.00 in 1924
65,356.89 in 1925
58,434.96 in 1926

which was not income properly chargeable to the Petitioner, and which in fact was never received by him or credited to him, but was in fact income of the trust estate created under the Will of Wm. Blair, the father of this Petitioner; which said income was in fact properly distributed by the trustees of the estate of Wm. Blair to Edith Blair, Edward Seymour Blair, Lucy Blair Linn and Wm. McCormick Blair.

(b) The Commissioner of Internal Revenue erred in increasing this Petitioner's income in the amount of $16,856.89, as a result of the disallowance of the deductions by the trustees of the estate of Edward T. Blair for commissions and legal expenses paid in connection with two leases on real estate which constituted a part of the assets of said estate.

[fol. 4] (5) The facts upon which the Petitioner relies as the basis of this proceeding are as follows:

(a) Wm. Blair, the father of this Petitioner, and a resident of the City of Chicago, County of Cook and State of Illinois, died on or about the 10th day of May, 1899, leaving a Last Will and Testament wherein he provided among other matters for the creation of a trust estate in the hands of the trustees named therein, Chauncey J. Blair and Edward Tyler Blair. By the terms of this trust the wife of decedent was to receive one-half of the net income of the said trust estate and the son of the decedent, the Petitioner herein, was to receive the other one-half, until the death of said wife and after that time the Petitioner herein was to receive a whole of the net income of the said trust estate for and during the full term of his natural life.

The wife of the decedent, Wm. Blair, died on or about the 13th day of March, 1923 and thereafter the said Petitioner, Edward T. Blair, under the terms of said Will became entitled to all of the income from said trust estate.

Thereafter on, to wit, the 2nd day of April, 1923, the said Petitioner, Edward T. Blair, made, executed and delivered three certain Indentures as follows:

(a) An Indenture wherein Edward T. Blair was the party of the first part, and Lucy Blair Linn was the party of the second part, and whereby the said Edward T. Blair did sell, assign, transfer and set over unto the said Lucy Blair Linn $6000.00 for the remainder of the current calendar year, and $9000.00 for each calendar year thereafter in the net income which the said Edward T. Blair was then, or might thereafter, be entitled to receive during his life from the Trustees under the will of William Blair, deceased.

(b) An Indenture similar in all particulars, wherein Edward T. Blair was the party of the first part, and Edith Blair was the party of the second part, the amount of said assignment being $9000.00 in each calendar year out of the net income from the trust estate of William Blair, deceased.

(c) An Indenture similar in every particular, wherein Edward T. Blair was the party of the first part, and Edward Seymour Blair was the party of the second part, the amount of said assignment being $9000.00 in each calendar year out of the net income from the said trust estate of William Blair, deceased.

Thereafter this Petitioner made, executed and delivered other indentures similar in all particulars, assigning to the [fol. 5] following persons the following sums in each calendar year from the date thereof out of the net income of said trust estate:

September 1, 1924	Edith Blair	$3000.00
September 1, 1924	Lucy Blair Linn	3000.00
September 1, 1924	Edward Seymour Blair	3000.00
January 2, 1925	Edward Seymour Blair	6000.00
January 2, 1925	Wm. McCormick Blair	4000.00
May 1, 1925	Edith Blair	3000.00
December 1, 1925	Lucy Blair Linn	6000.00
January 2, 1926	Wm. McCormick Blair	2000.00

The full force and effect of said Indentures was recognized as valid by the said trustees and the trustees paid to the parties named in the said Indentures during the years 1924, 1925 and 1926 the following amounts, which amounts were reported by them respectively in their income tax re-

turns for said years and the taxes assessed thereon paid by them:

	1924	1925	1926
Edith Blair	$10,000.00	$14,000.00	$15,000.00
Edward Seymour Blair	10,000.00	18,000.00	18,000.00
Lucy Blair Linn	10,000.00	12,500.00	18,000.00
Wm. McCormick Blair		4,000.00	6,000.00

The examining officer in Chicago and the Commissioner of Internal Revenue have added the above sums to the income actually received by this Petitioner from said trust estate during said years. The Commissioner's letter of November 16, 1928 states

"You are advised that this office holds that the assessments made by you to your children does not change the taxable status of the proceeds received by you from the estate."

This Petitioner contends that this ruling is incorrect with respect to the assessments here in question. This Petitioner particularly points out that this ruling is inaccurate in its reference to proceeds of the trust "received" by Petitioner from the estate. As hereinbefore stated, the amounts assigned to the children of this Petitioner were paid to them by the trustees and were never received by this Petitioner. The children of this Petitioner included these amounts in their returns for said years and paid the tax assessed on them.

In 1925 the trustees of the estate of William Blair executed a twenty-five year lease on real estate situated at 180 W. Randolph Street, Chicago, Illinois, and a twenty year lease on real estate located at 729 So. Wabash Avenue, Chicago, Illinois. Incident to the execution of the first of these [fol. 6] leases the trustees paid $11,640.00 as a commission to a real estate broker and $200.00 for legal services. Incident to the execution of the second lease the trustees paid $5,479.46 to a real estate broker and $300.00 for legal services. The total of these amounts, $17,619.46, was paid by the trustees out of the current funds of the estate in the year 1925 and charged as expense. This estate has considerable holdings in real estate in the City of Chicago and frequently makes leases and pays commissions and legal fees in the operation of these properties. The trustees distributed as the net income of this estate the amount remaining in their hands after the deductions of these expenses, together with other expenses of the estate.

The examining officer in Chicago and the Commissioner of Internal Revenue increased the income of this Petitioner by the amount of $17,619.46 less $762.57, which they hold is the proper part of that expense to be attributed to the year 1925. This adjustment is erroneous for the reason that this additional amount was not distributable to the Petitioner in 1925.

The Commissioner's letter of November 16, 1928 adds $58,434.96 to the income reported by this Petitioner as received from the estate of William Blair. This increase is presumably the result of the ruling that the income paid to his children was taxable against him. However, the amount of the income paid to the children was only $57000.00. Because the Commissioner has not stated his grounds for this additional increase this Petitioner is unable to state specifically any facts in regard thereto.

Wherefore, the Petitioner prays that this Board may hear the proceeding and re-determine his tax liability for the years 1924, 1925 and 1926; that this Board may hold that the said items of income, above referred to, were not income of this Petitioner and that the deficiency in tax for said years proposed by the Commissioner be overruled and that judgment of no deficiency be entered herein.

J. F. Dammann, Jr., Attorney for the Petitioner, 140 So. Dearborn Street, Chicago, Illinois. Wilson, McIlvaine, Hale & Templeton, of Counsel, 140 So. Dearborn Street, Chicago, Illinois.

[fol. 7] *Duly sworn to by Edward T. Blair. Jurat omitted in printing.*

EXHIBIT "A" TO PETITION

Treasury Department, Washington

November 16, 1928.

Office of Commissioner of Internal Revenue

IT:AR:B-12
PL-60D

Mr. Edward T. Blair, 1516 Lake Shore Drive, Chicago, Illinois.

SIR:

In accordance with Section 274 of the Revenue Act of 1926 you are advised that the determination of your tax

liability for the years 1924, 1925 and 1926 discloses a deficiency of $30,918.82, as shown in the attached statement.

The sections of the law above mentioned allows you to petition the United States Board of Tax Appeals within sixty days from the date of the mailing of this letter for a redetermination of your tax liability. However, if you acquiesce in this determination, you are requested to execute the enclosed Form 866 and forward both original and dupli-
[fol. 8] cate to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:C:P-7.

Respectfully, D. H. Blair, Commissioner, by Wm. T. Sherwood, Acting Deputy Commissioner.

Enclosures: Statement. Form 866. Form 882. Form 7928.

Statement

IT:AR:B-12
PL-60D

November 16, 1928.

In re Mr. Edward T. Blair, 1516 Lake Shore Drive, Chicago, Illinois

Year	Deficiency in Tax
1924	$7,642.52
1925	10,399.94
1926	12,876.36
Total	$30,918.82

Reference is made to the report of the Internal Revenue Agent in Charge at Chicago, Illinois and to your protest submitted under date of September 28, 1928.

The only issue raised was whether the income from a life interest in the Estate of William Blair, which you assigned to your three children, is taxable income to you.

Since the same issue is now pending before the United States Board of Tax Appeals in connection with the determination of your tax liability for the year 1923, the action set forth in office letter dated August 30, 1928 is sustained.

[fol. 9] 1924

Net income reported on return		$44,262.15
Add:		
Understatement of income from the Estate of William Blair:		
Other income	$22,851.00	
Dividends	7,149.00	30,000.00
Adjusted net income		$74,262.15
Less:		
Exemption	$1,000.00	
Dividends	16,680.00	17,680.00
Income subject to normal tax		$56,582.15
Normal tax at 2% on $4,000.00		$80.00
Normal tax at 4% on $4,000.00		160.00
Normal tax at 6% on $48,582.15		2,914.93
Surtax on $74,262.14		8,890.78
Total tax		$12,043.71
Less:		
Earned income credit		20.00
Tax liability		$12,025.71
Tax assessed		4,383.19
Deficiency in tax		$7,642.52

Explanation of Changes

In accordance with the provisions of the will you were the sole beneficiary of the Estate of William Blair. There has, therefore, been included in your income the total distributive earnings of the estate.

You are advised that this office holds that the assignments made by you to your children do not change the taxable status of the proceeds received by you from the estate. Committee on Appeals and Review Recommendation 877, Cumulative Bulletin I-1, Page 239, United States Board of Tax Appeals, Volume 2, 1109—Appeal of Gideon N. Stieff.

[fol. 10] 1925

Net income reported on return		$14,405.29
Add:		
Understatement of income from the Estate of William Blair:		
Other income	$52,617.24	
Dividends	12,739.65	65,356.89
Adjusted net income		$79,762.18
Less:		
Exemption	$1,500.00	
Dividends	16,680.00	18,180.00
Income subject to normal tax		$61,582.18
Normal tax at 1½% on $4,000.00		$60.00
Normal tax at 3% on $4,000.00		120.00
Normal tax at 5% on $53,582.18		2,679.11
Surtax on $79,762.18		7,817.19
Total tax		$10,676.30
Less:		
Earned income credit		13.12
Tax liability		$10,663.18
Tax assessed		263.24
Deficiency in tax		$10,399.94

There has been included in your income the total distributive earnings of the Estate of William Blair.

1926

Net income reported on return		$50,476.88
Add:		
Understatement of income from the Estate of William Blair:		
Other income	$49,519.59	
Dividends	8,915.37	58,434.96
Adjusted net income		$108,911.84

Less:		
Exemption	$1,500.00	
Dividends	16,680.00	$18,180.00
Income subject to normal tax		$90,731.84
[fol. 11] Normal tax at 1½% on $4,000.00		$60.00
Normal tax at 3% on $4,000.00		120.00
Normal tax at 5% on $82,731.84		4,136.59
Surtax on $108,911.84		13,442.37
Total tax		$17,758.96
Less:		
Earned income credit	$13.12	
Tax paid at source	29.50	42.62
Tax liability		$17,716.34
Tax assessed		4,839.98
Deficiency in tax		$12,876.36

Explanation of Change

There has been included in your income the total distributive earnings of the Estate of William Blair.

1924		
Tax reported on return	$4,383.19	
Proposed deficiency	7,642.52	
		$12,025.71
1925		
Tax reported on return	$263.24	
Proposed deficiency	10,399.94	
		10,663.18
1926		
Tax reported on return	$4,839.98	
Proposed deficiency	12,876.36	17,716.34
Tax liability stated on Form 866		$40,405.23

Payment should not be made until a bill is received from the Collector of Internal Revenue for your district, and remittance should then be made to him.

[fol. 12] BEFORE UNITED STATES BOARD OF TAX APPEALS

* * * (Caption—No. 42313) * * *

ANSWER—Filed February 15, 1929

The Commissioner of Internal Revenue by C. M. Charest, General Counsel, Bureau of Internal Revenue, for answer to the petition filed in the above-entitled appeal, admits and denies as follows:

1. Admits the allegations contained in paragraph 1.

2. Admits the allegations contained in paragraph 2.

3. Admits the allegations contained in paragraph 3.

4. Denies that the Commissioner committed the errors alleged in paragraph 4.

5. Denies the allegations contained in paragraph 5.

Denies, generally and specifically, each and every allegation contained in the taxpayer's petition not hereinbefore admitted, qualified or denied.

Wherefore, it is prayed that the taxpayer's appeal be denied.

(Signed) C. M. Charest, General Counsel, Bureau of Internal Revenue. Of Counsel: Arthur Carnduff, Special Attorney, Bureau of Internal Revenue.

[fol. 13] BEFORE UNITED STATES BOARD OF TAX APPEALS

* * * (Caption—No. 63741) * * *

Appearances:

For Taxpayer: J. F. Dammann, Esq., C. F. Selfridge, Esq.,

For Comm'r.: B. A. Low, Esq.,

SBA/mhk.

2/14/29.

DOCKET ENTRIES

1932.

Apr. 2. Petition received and filed. Taxpayer notified. (Fee paid)

Apr. 2. Copy of petition served on General Counsel.

May 2. Answer filed by General Counsel.

DOCKET ENTRIES—Continued

1932.

May 12. Copy of answer served on taxpayer. General Calendar.

Nov. 7. Hearing set Dec. 13, 1932.

Nov. 18. Motion to place on Reserve Calendar filed by taxpayer. 11/21/32 granted to Reserve A.

Nov. 18. Motion to place on Reserve Calendar filed by General Counsel. No action necessary.

1933.

Mar. 29. Motion to place on Day Calendar filed by General Counsel. 4/3/33 granted.

Apr. 5. Hearing set May 8, 1933.

Apr. 7. Motion for Circuit Hearing at Chicago, Ill. filed by taxpayer. 4/10/33 granted.

Jul. 24. Hearing set week of 8/28/33 at Chicago, Ill.

Sep. 5. Hearing had before S. J. McMahon, Div. 16. Submitted on merits. Consolidated for hearing with docket 42313. Stipulation of facts filed. On petitioner's motion to continue, taken C. V. A. Petitioner's brief due Oct. 1, 1933 (Brief on motion to continue).

Sep. 18. Transcript of hearing of 9/5/33 filed.

Oct. 2. Brief filed by taxpayer.

1934.

Apr. 18. Order that proceedings be restored to Day Calendar of May 2, 1934 for further hearing regarding stipulation of facts filed 9/5/33, entered.

May 2. Hearing had before Mr. McMahon, Div. 16. Submitted on merits. No briefs. (Further hearing.)

May 14. Transcript of hearing of May 2, 1934 filed.

[fol. 14]

1935.

Jan. 31. Findings of fact and opinion rendered, S. J. McMahon, Div. 16. Decision will be entered under Rule 50.

Mar. 1. Notice of settlement filed by General Counsel.

Mar. 4. Hearing set March 20, 1935 under Rule 50.

Mar. 19. Consent to settlement filed by taxpayer.

Mar. 25. Decision entered, S. J. McMahon, Div. 16.

DOCKET ENTRIES—Continued

1935.

Jun. 12. Petition for review by U. S. Circuit Court of Appeals (7) with assignments of error filed by General Counsel.

June 27. Proof of service filed by General Counsel.

Aug. 1. Motion for extension to Sept. 12, 1935 to prepare and transmit record filed by General Counsel.

Aug. 1. 1935. Order enlarging time to Sept. 12, 1935 to prepare and transmit record entered.

Sep. 9. Agreed statement of evidence lodged.

Sep. 9. Præcipe with proof of service thereon filed.

Sep. 12. Order enlarging time to Nov. 1, 1935 for preparation of evidence and delivery of record entered.

Oct. 2. Order that clerk of the Board be directed to omit any statement of evidence in the record to be transmitted by him to the U. S. Circuit Court of Appeals for the 7th Circuit entered. (See memorandum attached.)

BEFORE UNITED STATES BOARD OF TAX APPEALS

* * * (Caption—No. 63741) * * *

PETITION—Filed April 2, 1932

The above named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his Notice of Deficiency (IT:AR:D-1), ——————— dated February 5, 1932, and as a basis of (AHS-60D) his petition alleges as follows:

(1) Petitioner is an individual with residence at 1516 Lake Shore Drive, Chicago, Illinois.

(2) The notice of Deficiency (a copy of which is attached and marked Exhibit "A") was mailed to the taxpayer on February 5, 1932. In said letter of deficiency reference is [fol. 15] made to the report of the Internal Revenue Agent in Charge at Chicago. A copy of said report is attached

hereto and marked Exhibit "B". The report of the Revenue Agent refers to a report on the return of the estate of William Blair; a copy of the report of said estate is attached hereto and marked Exhibit "C".

(3) The taxes in controversy are income and profit taxes for the calendar year 1929. The amount in controversy is $14,533.58.

(4) The determination of the tax set forth in said Notice of Deficiency is based on the following errors:

(a) The Commissioner of Internal Revenue has erroneously included as income of this taxpayer the sum of $57,000 as additional income from the William Blair trust on account of $57,000 which was paid in 1929 by the trustees of said trust to children of the taxpayer pursuant to assignments to said children of part of the taxpayer's interest in said trust estate.

(b) The Commissioner of Internal Revenue has erroneously increased the net income of said William Blair trust and erroneously increased the income of this taxpayer as the life beneficiary of said trust in the amount of $14,541.34 on account of the disallowance of the following deductions claimed as necessary expense in the operation of a certain building belonging to said trust located at 608 South Wabash Avenue, Chicago, Illinois:

(1)	$5,580.	as a commission paid on April 30, 1929, to a real estate broker for services in connection with the consummation of a ten year lease on said premises.
(2)	10,000.	paid for expenditures for repairing said building.
	$15,580.	Total disallowed.

The Commissioner did not rule that these two items were not deductible but ruled that the total amount was not deductible in 1929. He allowed $1038.66 being one-tenth of the said total as the proper proportion of the total for the eight months in 1929 that the tenant occupied the premises. The net disallowance, therefore, was $14,541.34.

(c) The Commissioner of Internal Revenue erred in not allowing this petitioner a deduction for a part of the sum

of $17,619.46 paid out by them in 1925 on account of commissions paid to real estate brokers for leases on trust [fol. 16] property and legal fees in connection therewith. The Trustees claimed this deduction on their return for the year 1925. The Commissioner disallowed said deduction on the ground that it should be spread over the period of the lease. The Commissioner should be consistent and should allow a proportionate deduction in 1929 if his contention is sustained by the Board in Docket Number 42313. We estimate that under the Commissioner's theory, the proportionate part of this expense attributable to 1929 is $762.57.

(5) The facts upon which the petitioner relies as the basis for this proceeding are as follows:

(a) William Blair, the father of this petitioner and a resident of the City of Chicago, County of Cook and State of Illinois, died on or about the 10th day of May, 1899, leaving a Last Will and Testament, wherein he provided, among other matters, for the creation of a trust estate in the hands of the Trustees named therein, Chauncey J. Blair and Edward Tyler Blair. By the terms of this trust the wife of the decedent was to receive one-half of the net income of the said trust estate, and the son of the decedent, the petitioner herein, was to receive the other one-half. The wife of the decedent died on or about May 13th, 1923, and thereafter by the terms of said will, petitioner, Edward T. Blair, was entitled to all of the income from the trust. Thereafter the petitioner, Edward T. Blair, assigned and transferred to his children, Lucy Blair Linn, Edith Blair, Edward Seymour Blair and William McCormick Blair, respectively, an interest in his life estate in said William Blair trust.

The interest assigned to Lucy Blair Linn was represented by $18,000 of the income of said trust until the death of either Edward T. Blair or Lucy Blair Linn. The transfer was irrevocable. It was represented by three indentures dated April 2, 1923, September 1, 1924 and December 1, 1925. A notice in writing of each of these instruments was delivered to the Trustees of the William Blair trust and said Trustees accepted said transfers, and in the year 1929 paid to Lucy Blair Linn $18,000 of the income of the trust.

(a-1) The interest assigned to Edith Blair was represented by $15,000 of the income of said trust until the death of either Edward T. Blair or Edith Blair. The transfer was irrevocable. It was represented by three indentures dated April 2, 1923, September 1, 1924 and May 1, 1925. A notice in writing of each of these instruments was delivered to the Trustees of the William Blair trust and said Trus- [fol. 17] tees accepted said transfers, and in the year 1929 paid to Edith Blair $15,000 of the income of the trust.

(a-2) The interest assigned to Edward Seymour Blair was represented by $18,000 of the income of said trust until the death of either Edward T. Blair or Edward Seymour Blair. The transfer was irrevocable. It was represented by three indentures dated April 2, 1923, September 1, 1924 and January 2, 1925. A notice in writing of each of these instruments was delivered to the Trustees of the William Blair trust and said Trustees accepted said transfers, and in the year 1929 paid to Edward Seymour Blair $18,000 of the income of the trust.

(a-3) The interest assigned to William McCormick Blair was represented by $6000 of the income of said trust until the death of either Edward T. Blair or William McCormick Blair. The transfer was irrevocable. It was represented by two indentures dated January 2, 1925 and January 2, 1926. A notice in writing of each of these instruments was delivered to the Trustees of the William Blair trust and said Trustees accepted said transfers, and in the year 1929 paid to William McCormick Blair $6000 of the income of the trust.

(a-4) Lucy Blair Linn, Edith Blair, Edward Seymour Blair and William McCormick Blair each filed income tax returns for the year 1929, reported thereon the income so received from the William Blair trust and paid proper tax thereon. Nevertheless, the Commissioner of Internal Revenue has ruled that all of said income was taxable to this petitioner. This Board held in the case of Blair v. Commissioner, 18 B. T. A. 69, involving the income of this petitioner for the year 1923, that the income from the interests so assigned was not income of this petitioner. The Commissioner of Internal Revenue has appealed from this deci-

sion to the United States Circuit Court of Appeals for the Seventh Circuit. The appeal is still pending.

(b) In 1929 the Trustees of the William Blair trust negotiated a lease of one of the buildings owned by them, located at 608 South Michigan Avenue, Chicago, Illinois, for a ten-year term. In the same year they paid to the real estate broker, who assisted in the negotiation of the lease, $5580 as his commission; also in 1929 the Trustees paid $10,000 for repairs to the building, the building had been vacant for some time, and ordinary repairs had accumulated. The items for which the $10,000 was paid were repairs to the roof, repairs to the elevator, repairs to the floors, parti- [fol. 18] tions, etc. The commission paid and the repairs were all necessary business expense. This trust estate owns a considerable amount of improved real estate in Chicago. The repairs are constantly being made to the properties, leases are made from time to time as prior leases expire or default is made by the tenant. Leasing and operating of these premises are a principal part of the business of the trust. The Commissioner has disallowed both of these deductions. He has ruled that these expenditures are not deductible in the year in which they were paid. He has, however, prorated this expense over the term of the lease and has allowed a deduction of $1038.66 as representing the part applicable to the eight months of the term in 1929. But the Trustees have decided to pay these items out of 1929 income and they deducted them in determining the taxpayer's income.

(c) In 1925 the Trustees of the William Blair trust executed a twenty-five year lease on property owned and operated by the trust situated at 180 West Randolph Street, Chicago, Illinois. In connection therewith it paid $11,640 as a commission to the real estate broker who assisted in the negotiation of the lease, and $200 for legal services in connection therewith. In their return for that year the Trustees deducted the total amount of these expenditures as business expense in that year. The Commissioner disallowed the deduction and ruled that only a proportionate part thereof should be allowed.

(c-1) In 1925 the Trustees of the William Blair trust executed a twenty-year lease on real estate owned and

operated by them at 729 South Wabash Avenue, Chicago, Illinois, and paid as a commission to the real estate broker $5479.46 and $300.00 for legal services. The Trustees claimed the deduction of these two amounts as a necessary business expense paid in 1929. The Commissioner, however, disallowed the deduction and ruled that the Trustees were entitled to a proportionate amount thereof in that year. These two rulings of the Commissioner were appealed from by Edward T. Blair in the case of Blair v. Commissioner, Docket No. 42313, in the United States Board of Appeals. This case has not yet come up for hearing. In preparing the income tax returns for the year 1929 for the trust and for Mr. Edward T. Blair, no deduction was taken on account of these expenditures made in 1925. The Trustees and Mr. Blair have relied upon the correctness of their original deduction, But the Commissioner should have been consistent and on his audit should have allowed a de-[fol. 19] duction for one-twenty-fifth (1/25) of the expenses paid for commission and legal fees, totalling $11,840.00 for the property at 180 West Randolph Street. He also should have allowed one-twentieth of the $5,779.46 paid in 1925 for commission and legal fees on the property at 729 South Wabash Avenue for the same reason.

Wherefore, the petitioner prays that this Board may hear the proceeding and redetermine his tax liability for the year 1929; that this Board may hold:

(1) That the income paid by the Trustees of the William Blair Trust in 1929 to Lucy Blair Linn, Edith Blair, Edward Seymour Blair and William McCormick Blair, totalling $57,000 was not income of this taxpayer and not taxable to him.

(2) That the $5580 paid for commission and the $10,000 paid for repairs to the building at 608 South Michigan Avenue are properly deductible as necessary business expense in the year 1929.

(3) That this taxpayer is entitled to a deduction of a pro rata part of the expenditures made in 1925 for commissions and legal services on two leases if the Commissioner's ruling that the total of those expenditures was not properly

deductible in 1925, and that there is no deficiency due from the petitioner for the year 1929.

J. F. Dammann, Stuart J. Templeton, Calvin F. Selfridge, Attorneys for Petitioner, 140 South Dearborn Street, Chicago, Illinois. Wilson & McIlvaine of Counsel, 140 South Dearborn Street, Chicago, Illinois.

Duly sworn to by Edward T. Blair. Jurat omitted in printing.

[fol. 20] EXHIBIT "A" TO PETITION

NP-2-28.

Treasury Department, Washington

Office of Commissioner of Internal Revenue

Address Reply to Commissioner of Internal Revenue and Refer to

Feb. 5, 1932.

Mr. Edward T. Blair, 1516 Lake Shore Drive, Chicago, Illinois.

SIR:

You are advised that the determination of your tax liability for the year(s) 1929 discloses a deficiency of $14,533.58, as shown in the statement attached.

In accordance with section 272 of the Revenue Act of 1928, notice is hereby given of the deficiency mentioned. Within sixty days (not counting Sunday as the sixtieth day) from the date of the mailing of this letter, you may petition the United States Board of Tax Appeals for a redetermination of your tax liability.

However, If Your Do Not Desire To Petition, you are requested to execute the enclosed agreement form and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:C:P-7. The signing of this agreement will expedite the closing of your return(s) by permitting an early assessment of any deficiency and preventing the accumulation of interest charges, since the interest period terminates thirty days after filing the en-

closed agreement, or on the date assessment is made, whichever is earlier; Whereas If No Agreement Is Filed, interest will accumulate to the date of assessment of the deficiency.

Respectfully, David Burnet, Commissioner, by J. C. Wilmer, Deputy Commissioner.

Enclosures: Statement. Form 882. Form 870.

[fol. 21] Statement

IT:AR:D-1
AHS-60D

In re Mr. Edward T. Blair, 1516 Lake Shore Drive, Chicago, Illinois

Tax Liability

Year	Tax Liability	Tax Assessed	Deficiency
1929	$16,236.15	$1,702.57	$14,533.58

The report of the internal revenue agent in charge at Chicago, Illinois, covering an examination of your books of account and records for 1929 has been reviewed by this office together with your protest and a memorandum of a conference held in the internal revenue agent's office July 17, 1931 resulting in the above deficiency in tax outlined as follows:

Net Income

Net income reported on return		$35,524.85
Add:		
1. Other income from trust estate		52,439.05
2. Dividends		22,702.29
Adjusted net income		$110,666.19

Computation of Tax

Adjusted net income		$110,666.19
Less:		
Dividends	$42,484.00	
Personal exemption	1,500.00	
		43,984.00
Balance subject to normal tax		$66,682.19

Computation of Tax—Continued

Normal tax at ½% on $4,000.00	$20.00
Normal tax on 2% on $4,000.00	80.00
Normal tax at 4% on $58,682.19	2,347.29
Surtax on $110,666.19	13,793.24
Total tax due	$16,240.53
Less:	
Earned income credit	4.38
Total tax assessable	$16,236.15
Tax assessed	1,702.57
Deficiency in tax	$14,533.58

[fol. 22] Explanation of Changes

1 and 2. This office has sustained the revenue agent in determination of the income of the Trust Estate of William Blair after consideration of your protest and holds that the income is 100% taxable income on your return pending a court decision covering the year 1923.

Due to the fact that the statute of limitations will presently bar any assessment of additional tax against you for the year 1929 the Income Tax Unit will be unable to afford you an opportunity to discuss your case before mailing formal notice of its determination as provided by section 274(a) of the Revenue Act of 1926 and/or section 272(a) of the Revenue Act of 1928. It is, therefore, necessary at this time to issue this formal notice of deficiency.

A copy of this communication has been transmitted to your representative, Mr. Calvin F. Selfridge, 140 South Dearborn Street, Chicago, Illinois, who has a power of attorney on file in this office.

EXHIBIT "B" TO PETITION

Memorandum

In re Edward T. Blair, 1516 Lake Shore Drive, Chicago, Ill.

Examining Officer: B. H. Ryan

Year	Additional Tax
1929	$14,533.58

Preliminary Statement

Index:

Pages 3.
Schedules 1—3.

Taxpayers income is received from the Estate of William Blair, from dividends and transactions in securities.

Taxpayer is single.

Taxpayer is the trustee and was the sole beneficiary of the Estate of William Blair until he assigned a part of his life interest in the income to his children.

This assignment was not recognized by the Commissioner, and the appeal of taxpayer was decided by the Board favor-
[fol. 23] able to taxpayer 18 BTA-69. The Commissioner did not acquiesce. See report on Estate of William Blair submitted herewith.

The changes made in this report were explained to Miss Wood, Secretary. She does not approve.

Summary

1929 Increase in Income	$75,141.36	
Additional Tax		$14,533.58

Schedule 1

Year ended 12-31-1929.

Net Income

Net income as disclosed by return		$35,524.85
As corrected		110,666.19
Net adjustment		$75,141.34
Unallowable deductions and additional income:		
(a) William Blair Estate	$52,439.05	
(b) Dividends	22,702.29	
Total		75,141.34
Net Adjustment as above		$75,141.34

Schedule 1-A

Explanation of Items

(a) Income reported from Estate of William Blair $23,175.74 should be $75,614.79. Increase of $52,439.05 of "other Income."

(b) Dividends reported $19,781.71. Should be $42,484.00. Increase of $22,702.29.

Increase dividends:

William Blair Estate Reported	$11,681.71
William Blair Estate Corrected	30,784.00
William Blair Estate Increase	$19,102.29
Nash Motor Increase	3,600.00
	$22,702.29
Reported on return	19,781.71
Total dividends	$42,484.00

See report submitted herewith on Estate of William Blair for detail information re the above changes.

[fol. 24] Items Not Changed

Other items of income and deductions were verified and found correct as reported.

Schedule 2

Year ended 12-31-1929.

Computation of Tax

Net income (Schedule 1)		$110,666.19
Income subject to surtax		$110,666.19
Less: Dividends	$42,484.00	
Personal exemption and credit for dependents	1,500.00	43,984.00
Balance subject to normal tax		$66,682.19
Normal tax at ½% on $4,000.00	20.00	
Normal tax at 2% on $4,000.00	80.00	
Normal tax at 4% on $58,682.19	2,347.29	
Surtax on $110,666.19	13,793.24	
		16,240.53
Total tax assessable		$16,240.53

Less: Credit for earned net income (Sched. 3)	$4.38	4.38
Total tax assessable		$16,236.15
Tax previously assessed		1,702.57
Additional tax to be assessed		$14,533.58

Schedule 3

Year ended 12-31/29.

Computation of Earned Income Credit

Income Tax

Earned net income		$5,000.00
Less personal exemption and credit for dependents		1,500.00
Balance		$3,500.00
Normal tax at ½% on $3,500	$17.50	
Total Tax		$17.50
Credit of 25%		$4.38

[fol. 25] EXHIBIT "C" TO PETITION

Memorandum.

In re William Blair Esate, (1041) W. McCormick Blair, Trustee, 137 West Jackson Boulevard, Chicago, Illinois

Examining Officer, B. H. Ryan

Additional Income, 1929, $14,541.34.

Preliminary Statement

Index:
Pages: 1 to 2
Schedules: 1 to 2.

This trust Estate was created under the will of William Blair, and the income was payable to Edward T. Blair, who is also the Trustee.

Edward T. Blair made an assignment of a part of his life interest in the income of the Estate to his children, viz:

W. McCormick Blair.
Seymour Blair.
Edith Blair and Lucy Blair Linn.

The action of the Commissioner in taxing the entire income to Edward T. Blair was protested and was carried to the Tax Appeals Board. The assignment was held valid by the Board in their decision reported in B. T. A. #18, page 69. The Commissioner, however, did not acquiesce in this decision, and this examination shows distribution of the entire Estate income to Edward T. Blair.

Reports of examinations of the various beneficiaries under assignment, are submitted herewith.

The change made was discussed with Mr. Larson, of Lee, Higginson & Company. He does not agree.

[fol. 26] Summary

1929 Increase in income	$14,541.34

Schedule 1

Year ended 12/31/34.
Year ended 12/31/1929.

Net Income

Net income as disclosed by return		$91,857.45
As corrected		106,398.79
Net adjustment		14,541.34
Unallowable deductions and additional income:		
(a) Increase in rental	$15,580.00	
Total		15,580.00
Nontaxable income and additional deductions:		
(b) Expense	1,038.66	
Total		1,038.66
Net adjustment as above		14,541.34

Schedule 1-A

Year ended 12/31/1929.

Explanation of Items Changed

(a) (1)

$14,541.34 represents increase in rental property at 608 South Michigan Avenue.

On April 30, 1929 a ten year lease was negotiated and a commission of $5,580.00 paid. $10,000 was paid by the Es-

tate to the tenant, Irwin & Company for expenditures made by them for new elevators and other changes required by them. Other expense of $1,284.03 for levels and shoring and $2,718.70 for general repairs, have been allowed. $1,038.66, or 1/10 of $15,580 for 8 months has been allowed in this report.

Items not changed

Other income reported and deductions claimed were verified and accepted as reported.

Schedule 2

Year ended 12/31/1929.

Distribution of Income

Name and Address	Per Cent	Cash Dividends	Other Income
Edward T. Blair, 1516 Lake Shore Drive, Chicago, Illinois	100	$30,784.00	$75,614.79

[fol. 27] Before United States Board of Tax Appeals

* * * (Caption—No. 63741) * * *

Answer—Filed May 2, 1932

The Commissioner of Internal Revenue by his attorney, C. M. Charest, General Counsel, Bureau of Internal Revenue, for answer to the petition filed in the above-entitled appeal, admits and denies as follows:

(1) Admits the allegations contained in paragraph (1) of the petition.

(2) Admits the allegations contained in paragraph (2) of the petition.

(3) Admits the allegations contained in paragraph (3) of the petition.

(4) Denies that the Commissioner of Internal Revenue erred in manner and form as alleged in paragraph (4), subparagraphs (a) to (c) inclusive, of the petition.

(5) Denies the allegations contained in paragraph (5), subparagraphs (a) to (c), inclusive, and subdivisions thereunder, of the petition.

Denies generally and specifically each and every allegation contained in the taxpayer's petition not hereinbefore admitted, qualified or denied.

Wherefore, it is prayed that the taxpayer's petition be denied.

(Signed) C. M. Charest, General Counsel, Bureau of Internal Revenue. Of Counsel: Prew Savoy, Special Attorney, Bureau of Internal Revenue.

acb 4/29/32.

[fol. 28] BEFORE UNITED STATES BOARD OF TAX APPEALS

* * * (Caption) * * *

STIPULATION OF FACTS—Filed at Hearing September 5, 1933

It Is Hereby Agreed by and between the petitioner, Edward T. Blair, by his attorneys, J. F. Dammann, Stuart J. Templeton and Calvin F. Selfridge, and the respondent, the Commissioner of Internal Revenue, by his attorneys, E. Barrett Prettyman, General Counsel for the Bureau of Internal Revenue, that the following facts are facts and may be included in the findings of fact by the Board:

1. The petitioner is a resident of Chicago, Illinois. His father, William Blair, was also a resident of Chicago. The latter died May 10, 1899, leaving a Last Will and Testament which was duly admitted to probate in the Probate Court of Cook County, Illinois. A true copy of said will is marked "Petitioner's Exhibit 1" and may be received in evidence in these cases as though it were the original duly admitted in open court.

2. The wife of said William Blair died on or about March 13, 1923.

3. On or about April 2, 1923, the petitioner, Edward T. Blair, made, executed and delivered a certain Indenture in which he was the party of the first part and Lucy Blair Linn was the party of the second part. A copy of said Indenture is marked "Petitioner's Exhibit 2" and the same

may be admitted in evidence as though it were the original duly admitted in open court.

4. On or about April 2, 1923, the petitioner, Edward T. Blair, made, executed and delivered a certain Indenture in which he was the party of the first part and Edith Blair was the party of the second part. A copy of said Indenture is marked "Petitioner's Exhibit 3" and the same may be admitted in evidence as though it were the original duly admitted in open court.

5. On or about April 2, 1923, the petitioner, Edward T. Blair, made, executed and delivered a certain Indenture in which he was the party of the first part and Edward Seymour Blair was the party of the second part. A copy of said Indenture is marked "Petitioner's Exhibit 4" and the [fol. 29] same may be admitted in evidence as though it were the original duly admitted in open court.

6. Thereafter on their respective dates the petitioner made, executed and delivered two other Indentures in which he was the party of the first part and said Lucy Blair Linn was the party of the second part, which Indentures were dated September 1, 1924 and December 1, 1925, respectively. Copies of said Indentures are marked "Petitioner's Exhibit 5" and "Petitioner's Exhibit 6" respectively and the same may be received in evidence as though they were the originals duly admitted in open court.

7. On their respective dates the petitioner made, executed and delivered two other Indentures in which he was the party of the first part and said Edith Blair was the party of the second part, which Indentures were dated September 1, 1924 and May 1, 1925, respectively. Copies of said Indentures are marked "Petitioner's Exhibit 7" and "Petitioner's Exhibit 8" respectively and the same may be received in evidence as though they were the originals duly admitted in open court.

8. On their respective dates the petitioner made, executed and delivered two other Indentures in which he was the party of the first part and said Edward Seymour Blair was the party of the second part, which Indentures were dated September 1, 1924 and January 1, 1925 respectively. Copies of said Indentures are marked "Petitioner's Exhibit 9"

and "Petitioner's Exhibit 10" respectively and the same may be received in evidence as though they were the originals duly admitted in open court.

9. On their respective dates the petitioner made, executed and delivered two other Indentures in which he was the party of the first part and William McCormick Blair was the party of the second part, which Indentures were dated January 2, 1925 and January 2, 1926 respectively. Copies of said Indentures are marked "Petitioner's Exhibit 11" and "Petitioner's Exhibit 12" respectively and the same may be received in evidence as though they were the originals duly admitted in open court.

10. The petitioner, Edward T. Blair and his son, William McCormick Blair were, during the years 1923 to 1929 inclusive, and still are, the duly authorized and acting trustees of the trust created by the will of said William Blair.

11. On the respective dates of said Indentures (Petitioner's Exhibits 2 to 12 inclusive) the petitioners notified said trustees in writing of the assignments contained [fol. 30] therein and directed said trustees to make payments direct to the assignees. The said trustees accepted said assignments and noted their acceptance on the face of said notices. All of said notices and the acceptances by said trustees are substantially identical in form. A copy of the notice relating to the assignment of April 2, 1923, to Lucy Blair Linn is marked "Petitioner's Exhibit 13" and the same may be admitted in evidence as though it were the original duly admitted in open court.

12. During the years 1924, 1925, 1926 and 1929 the said trustees of the William Blair trust distributed directly to Lucy Blair Linn, Edith Blair, Edward Seymour Blair and William McCormick Blair the following amounts out of the income of the William Blair trust:

	1924	1925	1926	1929
Lucy Blair Linn.....	$10,000.00	$12,500.00	$18,000.00	$18,000.00
Edith Blair	10,000.00	14,000.00	15,000.00	15,000.00
Edward Seymour Blair.....	10,000.00	18,000.00	18,000.00	18,000.00
Wm. McCormick Blair.....	.....	4,000.00	6,000.00	6,000.00

13. Said Lucy Blair Linn, Edith Blair, Edward Seymour Blair and William McCormick Blair each filed income tax returns for each of said years in which they reported the

amounts thus distributed to them by the trustees of the William Blair trust, and they each paid to the Collector of Internal Revenue in Chicago the tax due thereon. Since the ruling of the Commission referred to in the following paragraph they have filed claims for the refund of the tax on such income. No refunds will be made until these cases are finally determined.

14. The respondent, the Commissioner of Internal Revenue, in auditing the fiduciary returns of the trustees of the William Blair trust and in auditing the returns of Edward T. Blair, Lucy Blair Linn, Edith Blair, Edward Seymour Blair and William McCormick Blair, adjusted said returns to show that all of the net income of said trust was distributed or distributable to Edward T. Blair, and the respondent has ruled that the petitioner should pay an income tax on all of said income and that no tax was due from Lucy Blair Linn, Edith Blair, Edward Seymour Blair and William McCormick Blair on account of the part of the trust income distributed to them.

15. During the year 1925 the William Blair trust owned five pieces of real estate in or about Chicago, Illinois, including those located at 180 West Randolph Street, 729 South Wabash Avenue and 608 South Michigan Avenue. [fol. 31] Said trust still owns said five pieces of real estate in Chicago.

16. During the year 1925 the trustees of said trust leased the piece of real estate located at 180 West Randolph Street for a term of twenty-five (25) years. Incident to the making of this lease they paid Eleven Thousand Six Hundred and Forty Dollars ($11,640.00) as a commission to a real estate broker and Two Hundred Dollars ($200.) for legal services.

17. During said year 1925, said trustees also executed and delivered a lease for a term of twenty (20) years on the property at 729 South Wabash Avenue. Incident to the making of this lease they paid Five Thousand Four Hundred Seventy-nine Dollars and Forty-six Cents ($5,479.46) as a commission to a real estate broker and Three Hundred Dollars ($300.) for legal services.

18. In the year 1929 said trustees executed and delivered a lease for a period of ten years on the property at 608

South Michigan Avenue. Incident to the making of said lease they paid Five Thousand Five Hundred Eighty Dollars ($5,580.) as a commission to a real estate broker.

19. Prior to the execution of said lease in 1929, the property at 608 South Michigan Avenue had been vacant for several months and was in need of extensive repairs. The lessors agreed that in lieu of making repairs on said premises they would allow to the lessee an aggregate amount of Ten Thousand Dollars ($10,000.) for repairs, improvements and additions to the premises on the condition that not less than that amount should be expended exclusive of trade fixtures and fittings. During 1929 the trustees paid said Ten Thousand Dollars ($10,000.) to the contractor employed to do said work. It is agreed that Five Thousand Dollars ($5,000.) thereof was for improvements to the building having a probable useful life equal to the term of said ten-year lease and Five Thousand Dollars ($5,000.) was in payment for ordinary repairs to the building. And it is agreed that Five Thousand Dollars ($5,000.) thereof is deductible in 1929 and the other Five Thousand Dollars ($5,000.) should be spread over the remaining period of said lease.

20. The trustees of said William Blair trust charged the commissions and legal fees incurred in connection with said three leases and the Ten Thousand Dollars ($10,000.) paid to the contractor for the work at 608 South Michigan Avenue against the income of the trust so that the net income to be distributed to the petitioner was actually reduced by the amount of these expenditures.

[fol. 32] 21. On or about March 24, 1933, the trustees of said William Blair trust filed their bill of complaint in the Superior Court of Cook County, Illinois, in Chancery, General Number 576471, praying that the court construe the will of said William Blair and advise the trustees whether the assignments from Edward T. Blair to Lucy Blair Linn, Edith Blair, Edward Seymour Blair and William McCormick Blair are valid and advise said trustees whether they should pay to said assignees part of the net income of the trust estate pursuant to said assignments.

22. It is further stipulated and agreed that the proofs in these cases (Docket numbers 42313 and 63741) shall

remain open for the introduction in evidence of the ultimate decree of the Superior Court of Cook County, Illinois, in said proceeding No. 576471 entered at the final termination of said proceedings, and it is further stipulated that a certified copy of such ultimate decree may be received in evidence in these cases, subject to the respondent's objection as to its materiality.

J. F. Dammann, Stuart J. Templeton, Calvin H. Selfridge, Attorneys for Petitioner. E. Barrett Prettyman, Attorneys for Respondent.

Petitioner's Exhibit 1

Know All Men by These Presents, that I, William Blair of the City of Chicago, in the County of Cook and State of Illinois, being of sound and disposing mind and memory, do make and publish this to be my last will and testament, hereby revoking all former wills and codicils thereto by me at any time made.

As to all the property and estate real and personal, of which I shall die seized and possessed, or to which I shall be entitled at the time of my decease, I give, devise, bequeath and dispose thereof, as follows, viz:

First. I order and direct my executors hereinafter named to pay and discharge all my just debts and funeral expenses and the specific money bequests herein given as soon after my decease as may be practicable.

Second. To my wife Sarah Maria Blair I give and bequeath all my household furniture and effects of every kind [fol. 33] and nature, including paintings, portraits, engravings, prints books, clothing silver plate and family supplies; also all my horses carriages harnesses and other implements and appliances used therewith the same to be for her sole use. And it is my will and I do hereby request that my said wife be permitted immediately after my decease to take hold and retain exclusive possession and control of the same as her own property and that my executors hereinafter named be neither required nor permitted to make or return into court any account or inventory thereof whatever.

Third. To my said wife I give and bequeath the sum of five thousand dollars in money.

Fourth. To my said wife I give devise and bequeath the homestead property and estate in which we now reside in the City of Chicago being situated on Michigan Avenue, number two hundred and thirty and described as follows, to wit: The south twenty-eight (28) feet of lot eight (8) and the north twenty-four (24) feet of lot nine (9) all in block twelve (12) in fractional section fifteen (15) addition to Chicago, to have and to hold the same to her for and during the full term of her natural life; she paying the taxes and assessments thereon and keeping the improvements thereon in good repair and condition.

Fifth. To my son Edward Tyler Blair, I give and bequeath my English gold watch my gold headed cane and any other articles of my personal use which he may desire; also the sum of five thousand dollars in money.

Sixth. To my daughter Anna Reubina Blair wife of my said son, I give and bequeath the sum of five thousand dollars in money.

Seventh. To Edith Blair, William McCormick Blair and Lucy Blair, children of my said son Edward Tyler Blair and his wife Anna Reubina Blair, I give and bequeath each the sum of one thousand dollars in money; and to each and every other child of my said son by his said wife which may hereafer be born to them and living at the date of my death I give and bequeath the sum of one thousand dollars in money and to the said William McCormick Blair I also give the gold watch and chain which I now use.

Eighth. To my sister Caroline Crosby I give and bequeath the sum of three thousand dollars in money, and in case she shall depart this life before my decease, it is my will that the said sum of money go and be paid to her daughter Mary E. Neely, if she be living at the time of my [fol. 34] decease; and I further give and bequeath to John C. Neely Jr. and Caroline B. Neely children of said Mary E. Neely, each the sum of one thousand dollars.

Ninth. To my sister Ann Eliza Densmore wife of Eleazer R. Densmore I give and bequeath the sum of three thousand dollars in money; and in case she shall depart this life before my decease it is my will that the said sum of money go and be paid to her daughter, Caroline B. Densmore if she is living at the time of my decease; and I further give and

bequeath to the said Caroline B. Densmore the sum of one thousand dollars if she be living at the time of my death.

Tenth. To Eliza Ann Ballard the sister of my said wife I give and bequeath the sum of one thousand dollars in money, if she shall be living at the time of my decease; also to Lavina B. Shumway wife of Edward G. Shumway the sum of one thousand dollars if she shall be living at the time of my decease and to Florence D. Ballard, wife of D. Page Ballard the sum of one thousand dollars, if she be living at the time of my death.

Eleventh. To Ellen S. Stults the sister of my said wife and wife of J. Madison Stults I give and bequeath the five following described promissory notes held by me, to wit: One note for six hundred and fifty dollars, dated December 1st, 1874, signed by said J. Madison Stults, and payable to my order five years after the date thereof; also a note for nine hundred dollars dated October 20th, 1875, and signed by J. Madison Stults and payable to the order of Harriet and Francis Williams and by them endorsed and delivered to me; also one note for nine hundred dollars, dated December 4th, 1880, signed by said J. Madison Stults, payable to Ellen K. Byrnes and assigned to me; also two notes of the said J. Madison Stults, dated October 12th, 1883, payable to Boyer & Eichhorn respectively in six and twelve months from the dates thereof and assigned to me; all of said notes secured by mortgages on lands in Huron County, Ohio; and with the said notes I also give to the said Ellen S. Stults the respective mortgages securing the same; and I also give and bequeath to the said Ellen S. Stults the sum of one thousand dollars in money; and in case she shall die before my decease it is my will that the said five notes and mortgages and the said sum of money go and be transferred delivered and paid to her two daughters Bertha and Sarah, and to the survivor of them, if they or either of them shall be living at the time of my decease.

[fol. 35] Twelfth. To George W. Seymour, a brother of my said wife I give and bequeath a promissory note held by me, for twenty three hundred eighty-six and 80/100 dollars, bearing date the 21st day of December, 1881, signed by him and payable to my order five years after the date thereof, and direct my executors to release and discharge the mortgage given to me as security therefor. I also give

and bequeath to the said George W. Seymour the sum of one thousand dollars in money; and in case she shall depart this life before my decease it is my will that the said note and mortgage and the said sum of money go and be transferred delivered and paid to his wife, Charlotte, and to his son and daughter Frank B. and Anna Seymour and to the survivors and survivor of them, if they or either thereof shall be living at the time of my decease.

Thirteenth. To Rev. John A. Seymour a brother of my said wife, I give and bequeath the sum of one thousand dollars in money, and in case he shall depart this life before my decease it is my will that the said sum of money go and be paid to his wife Sarah K. Seymour and his son George B. Seymour, and to the survivor of them, if they or either of them be living at the time of my decease.

Fourteenth. To my nephew Chauncey J. Blair and my son Edward Tyler Blair, of Chicago, I give devise and bequeath all the rest and residue of my real estate situated in the State of Illinois, including the brick store building standing on the east half of the west half of lot seven (7) in block nineteen (19) in the original town of Chicago, leased by me of the estate of the late John High, deceased, and including also my said homestead above described subject to the life estate therein of my said wife as herein given to her and also all shares of stock in the Merchants National Bank of Chicago and all shares of stock or bonds which I may own at the time of my decease of any municipal corporation or incorporated company. To have and to hold the same to them and to the survivor of them and to their successors, and to the heirs executors and administrators of such survivor and successor, but in trust however to and for the following uses and purposes namely: in trust to hold, manage control, improve and lease the same, at their discretion, and the same to keep well insured and in good and tenantable repair and condition and the same to rebuild in case of damage or destruction by fire or otherwise, and the income from said trust fund and estate to use expend account for and pay as follows to wit:

[fol. 36] A. To pay all the taxes, assessments and premiums for insurance thereon, all the costs and expenses of the necessary repairs upon the said real estate; all the cost and expense of the necessary additions to and altera-

tions and improvements in any of the buildings upon said real estate; all the cost and expense of re-building and repairing any building destroyed or damaged by fire or other casualty and also any and all other costs and expenses necessarily incident to the care management protection and preservation of said trust estate; all of the above to be done and performed by the trustees of said fund and estate as they, in their discretion and judgment shall deem for the best interest thereof and of those interested therein.

B. To pay to my said wife, as the same shall from time to time be received, one equal half part of all the net income which shall arise or accrue from the said trust fund and estate for and during the full term of her natural life.

C. To pay to my said son, as the same shall from time to time be received the other equal half part of all the net income which shall arise or accrue from the said trust fund and estate for and during the full term of his natural life.

D. At and after the decease of my said wife to pay my said son the whole of said net income for and during the full term of his natural life.

E. At and after the decease of my said son, he leaving no child or children, nor the descendants of any deceased child or children, him surviving but leaving his said wife him surviving and my said wife being still living to pay to the said wife of my said son one equal third part of said net income for and during the full term of the natural life of my said wife and to pay to my said wife for and during the full term of her natural life the remainder of said net income, and in such case, after the death of my wife to pay the whole of said net income to the wife of my said son during the remainder of her natural life.

F. At and after the decease of my said son he leaving him surviving his said wife and a child or children, or the descendants of a deceased child or children, and my said wife being still living to pay to my said son's said wife one equal half part of said net income for and during the full term of the natural life of my said wife; the said wife of my said son to receive the said income for the support of herself and for the support and education of the child or

children, and of the descendants of any deceased child or children of my said son.

[fol. 37] *C.* At and after the decease of my said son he leaving him surviving his said wife and a child or children, or the descendants of a deceased child or children, and upon the decease also of my said wife to pay to the said wife of my said son one equal half part of said net income for and during the full term of her natural life; and the remainder of said income during the natural life of my said son's said wife to pay to the child or children of my said son and to the descendants of any deceased child or children of his by right of representation share and share alike, and if any one of the persons entitled to share therein shall be minors such payments shall be made to their legal guardians respectively until they shall arrive at lawful age.

H. At and after the decease of my said wife and of my said son, and of the said wife of my said son, leaving them surviving any child or children or the descendants of any deceased child or children of my said son, then to pay the whole of the net income of said trust fund and estate to the child or children of my said son and to the descendants of any deceased child or children of his, by right of representation share and share alike, until the youngest living child of my said son shall have arrived at the age of twenty-one years, the shares of such as are minors to be paid to their legal guardians respectively and then to distribute transfer assign convey and deliver the whole of said trust fund and estate or so much thereof as shall then remain in their hands and possession, together with all unexpended and undistributed income therefrom to the child and children of my said son, and to the descendants of any deceased child or children of his, by right of representation, share and share alike, to have and to hold the same to them and to their heirs executors administrators and assigns forever.

I. At and after the decease of my said wife, and of my said son and of the said wife of my said son, leaving them surviving no child or children nor any descendants of any deceased child or children of my said son, then to distribute transfer assign convey and deliver the whole of said trust fund and estate, or so much thereof as shall then remain in their hands and possession together with all unexpended and undistributed income therefrom to my heirs at law; to

have and to hold the same to them and their heirs, executors administrators and assigns forever.

Fifteenth. To my said wife and my said son, I give and bequeath all the rest and residue of my property and estate of every name and nature share and share alike and [fol. 38] in case my said wife shall depart this life before my decease, it is my will, and I hereby declare that the said rest and residue of my property and estate shall go, belong and be paid and delivered to my said son, the same to be for his sole use.

Sixteenth. If for any reason my said wife shall desire to sell and dispose of our homestead aforesaid at any time and to reinvest the proceeds of the sale thereof, I hereby authorize and empower the said trustees at her request to join with her in the sale and conveyance thereof, for such price and upon such terms as she and they may deem expedient and to execute and deliver jointly with her a good and sufficient deed of conveyance thereof requisite in law to convey the title thereto in fee simple and in case of such sale and conveyance thereof the said trustees are hereby directed to invest the whole or a part of the proceeds thereof in another homestead for the use of my said wife during her natural life, or in improved unincumbered real estate in the business quarter of the City of Chicago; or part in each as my said wife may desire and in whatever way invested my said wife shall be entitled to the use benefit and income of the entire proceeds of said sale for and during the full term of her natural life and the same shall constitute a portion of the trust fund subject to such use and benefit thereof by my said wife to be dealt with and distributed in the same manner as above herein provided for the remainder of said trust property.

Seventeenth. I hereby also authorize and empower my said trustees to sell and dispose of the building now standing on said lot leased by me of the estate of John High, deceased, and also any and all lands by me owned in this State outside of the present limits of the City of Chicago for such price and prices and upon such terms as they may deem for the best interest of said trust fund and estate and of those interested therein and to make execute and deliver good and sufficient deeds of conveyance therefor requisite in law to convey the title thereto in fee simple. And upon

any such sale and sales and conveyance the said trustees are hereby directed to invest the proceeds of such sales in improved and unincumbered real estate situated in the business quarter of the City of Chicago and in any sale and conveyance which said trustees are authorized to make by the terms of this will the purchaser or purchasers need not see to the application of the purchase money.

The said trustees may in their discretion convert into money all or any part of the stocks and bonds hereby given [fol. 39] to them in trust for the purpose of changing the investment thereof and may invest and reinvest the proceeds and in case of destruction, by fire or other casualty, of improvements on real estate belonging to said trust may also convert into money a portion of the securities belonging to said trust fund if necessary to restore or rebuild such improvements.

Eighteenth. The said trustees shall have no power or authority to sell or dispose of any other portions of my real estate situated within the present limits of the City of Chicago or to mortgage or otherwise encumber any part of said trust fund or estate, or to lease any of said real estate for a term longer than five years, or to anticipate the income of said fund.

Nineteenth. I hereby authorize and empower my executors herein named and such of them as may from time to time be acting as such hereunder to sell and by quit claim deeds to convey any and all right, title and interest which I may have or appear to have, in or to all real estate wherever situated comprising any part of the assets of any business in which I am at the time of my decease, or before then have been interested in partnership with others and I also authorize and empower my said executors at their discretion to settle close up and adjust any business in which I may be engaged at the time of my decease whether alone or in partnership with others with full power and authority at their discretion, to settle adjust and compromise any disputed question claim or matter that may exist or arise in the settlement of my estate.

Twenty. I do hereby declare and direct that the income from said trust fund and estate which is herein ordered to be, from time to time as the same shall be received paid to my said wife and to my said son and to his said wife and to

their children and descendants of children in the cases aforesaid shall be paid to them directly upon their separate order and receipt therefor, for their sole and separate use respectively, and that the same shall not be nor be made nor held in any manner nor by any proceedings whether in law or equity while yet in the hands of said trustees liable for or subject to the payment of any of the debts or obligations of either of the persons entitled to the same as above herein set forth.

Twenty-first. the bequests herein made to and the provisions herein made for my said wife are made and intended and are by her to be accepted in lieu of all dower award or other interest in or allowance from or out of my estate.

[fol. 40] Twenty-second. It is my will and I do hereby direct, that in case from any cause a vacancy should arise in the trusteeship of said trust fund and estate during the lifetime of my friend John C. Neely he be by the court having jurisdiction of the matter appointed to fill such vacancy if he will accept the trust; and in cases of vacancies happening during the lifetime of my said wife and son, or of either of them, it is my will and I hereby request that said court fill the same by the appointment of such person and persons as the remaining trustee, for the time being and my said wife and son and the survivor of them, shall in writing request to be appointed and after the decease of my said wife and son, it is my will that said court fill such vacancies by the appointment of such person and persons as, in the judgment of the court, are suitable and competent to hold and judiciously manage the said trust. And I do hereby give and grant unto each and every person whom any court of competent jurisdiction may at any time appoint as trustee of said trust fund and estate the same powers and authority and discretions over and concerning the said trust fund and estate and in the management thereof, which I have herein given and granted to the trustees thereof herein named and appointed.

Twenty-Third. I give and bequeath to the trustees of Graceland Cemetery improvement Fund one thousand dollars to be kept carefully invested and the income thereof used perpetually for preserving caring for and keeping in good order and repair my cemetery lot in Graceland Cemetery together with any and all grave stones monuments or

other ereetions thereon and in case of failure to so apply said income for a period of two years this bequest shall be and become null and void and the amount thereof may be recovered by my lawful heirs in an appropriate action therefor.

Twenty-fourth. It is my desire that my trustees herein named or such persons as shall be hereafter appointed as such, shall receive a reasonable compensation for their services as such trustees.

I do hereby nominate and appoint my said wife Sarah Maria Blair, my nephew Chauncey J. Blair and my said son Edward T. Blair to be the executors of this my last will and testament and it is my will and I do hereby request that they be not required by the court in which this will may be probated, to give any other than their separate bonds without surety, for the performance of the duties of such executors.

[fol. 41] In Testimony Whereof I hereunto set my hand and seal and publish and declare this to be my last will and testament in the presence of the witnesses named below, this twenty-seventh day of July in the year of our Lord eighteen hundred and eighty-eight.

(On the 7th line of the preceding page the words "trustees of" were inserted before signing.

William Blair. (Seal.)

Signed sealed published and declared by the said William Blair as and for his last will and testament in the presence of us, who in his presence and in the presence of each other and at his request have subscribed our names as witnesses hereto.

Frederick W. Crosby, Chicago, Illinois. Edwin H. Gambes, Evanston, Illinois. Nathan G. Moore, Chicago, Illinois.

The erasures and changes made in pencil have been made as memorandums for a new will which has not at this date been made.

William Blair.

August 11th, 1897.

Will proved and admitted to Record in open court this 16th day of June A. D. 1899.

John H. Batton, Acting Probate Judge.

STATE OF ILLINOIS,
County of Cook, ss:

IN THE PROBATE COURT OF COOK COUNTY

Proved and admitted to Record in open court this 16th day of June A. D. 1899.

James Reddick, Clerk.

Filed May 25, 1899. James Reddick, Clerk.

COUNTY OF COOK, ss:

I, Mitchell C. Robin, Clerk of the Probate Court of Cook County and the keeper of the records and files thereof, in the State aforesaid, do hereby certify the annexed and foregoing to be a true and correct copy of the last will and testament of William Blair, deceased, as appears from the [fol. 42] original on file and from the records of the Probate Court in my office.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said Probate Court, at my office, in the City of Chicago, in said County, this 29th day of April, A. D. 1920.

Mitchell C. Robin, Clerk of the Probate Court.

Petitioner's Exhibit 2

This Indenture Made and entered into this 2nd day of April A. D. 1923, by and between Edward T. Blair of the City of Chicago, County of Cook and State of Illinois, party of the first part, and Lucy Blair Linn, of the said City of Chicago, party of the second part, Witnesseth:

That the said party of the first part, in consideration of love and affection and One Dollar ($1) in hand paid by the party of the second part, the receipt whereof is hereby acknowledged, does hereby sell, assign, transfer and set over unto said party of the second part an interest amounting to Six Thousand Dollars ($6,000) for the remainder of the current calendar year, and Nine Thousand Dollars ($9,000) in each calendar year thereafter in the net income which the said party of the first part now is, or may hereafter be, entitled to receive during his life from the Trustees under the Will of William Blair, Deceased, late of the said City of Chicago; and the said party of the first part hereby authorizes and empowers said party of the second part,

either in her own name or in the name of the said party of the first part, to receive and receipt to the Trustees under the Will of William Blair, deceased, for Six Thousand Dollars ($6,000) for the remainder of the current calendar year and for Nine Thousand Dollars ($9,000) in each year thereafter of the income and moneys which shall at any time become payable to said party of the first part under or by virtue of the terms and provisions of the said Will of William Blair, Deceased.

All payments hereunder shall be made in person to said party of the second part and not upon any written or verbal order nor upon any assignment, nor upon any transfer by operation of law, and shall cease upon the death of either party hereto.

In Witness Whereof the parties hereto have set their hands and seals the day and year first above written.

Edward T. Blair. (Seal.) Lucy Blair Linn. (Seal.)

[fol. 43] Petitioner's Exhibit 3

This Indenture Made and entered into this 2nd day of April A. D. 1923 by and between Edward T. Blair, of the City of Chicago, County of Cook and State of Illinois, party of the first part, and Edith Blair of the said City of Chicago, party of the second part, Witnesseth:

That the said party of the first part, in consideration of love and affection and One Dollars ($1) in hand paid by said party of the second part, the receipt whereof is hereby acknowledged, does hereby sell, assign, transfer and set over unto said party of the second part an interest amounting to Nine Thousand Dollars ($9,000) in each calendar year (including the remainder of the current calendar year) in the net income which the said party of the first part now is, or may hereafter be, entitled to receive during his life from the Trustees under the Will of William Blair, Deceased, late of the said City of Chicago; and the said party of the first part hereby authorizes and empowers said party of the second part, either in her own name, or in the name of the said party of the first part, to receive and receipt to the Trustees under the Will of William Blair, Deceased, for Nine Thousand Dollars ($9,000) in each year of the income and moneys which shall at any time become payable to said party of the first part under or by virtue of the terms and provisions of the said Will of William Blair, Deceased.

All payments hereunder shall be made in person to said party of the second part and not upon any written or verbal order nor upon any transfer by operation of law, and shall cease upon the death of either party hereto.

In Witness Whereof the parties hereto have set their hands and seals the day and year first above written.

Edward T. Blair. (Seal.) Edith Blair. (Seal.)

Petitioner's Exhibit 4

This Indenture Made and entered into this 2nd day of April, A. D. 1923 by and between Edward T. Blair, of the City of Chicago, County of Cook and State of Illinois, party of the first part, and Edward Seymour Blair of the City of Chicago, party of the second part, Witnesseth:

That the said party of the first part, in consideration of love and affection and One Dollar ($1.00) in hand paid by [fol. 44] said party of the second part, the receipt whereof is hereby acknowledged, does hereby sell, assign, transfer and set over unto said party of the second part an interest amounting to Nine Thousand Dollars ($9,000.00) in each calendar year (including the remainder of the current calendar year) in the net income which the said party of the first part now is, or may hereafter be, entitled to receive during his life from the Trustees under the Will of William Blair, deceased, late of the said City of Chicago; and the said party of the first part hereby authorizes and empowers said party of the second part, either in his own name or in the name of the said party of the first part, to receive and receipt to the Trustees under the Will of William Blair, deceased, for Nine Thousand Dollars ($9,000.00) in each year of the income and moneys which shall at any time become payable to said party of the first part under or by virtue of the terms and provisions of the said Will of William Blair, deceased.

All payments hereunder shall be made in person to said party of the second part and not upon any written or verbal order nor upon any assignment, nor upon any transfer by operation of law, and shall cease upon the death of either party hereto.

In Witness Whereof the parties hereto have set their hands and seals the day and year first above written.

Edward T. Blair. (Seal.) Edward Seymour Blair. (Seal.)

Petitioner's Exhibit 5

This Indenture Made and entered into this 1st day of September A. D. 1924 by and between Edward T. Blair, of the City of Chicago, County of Cook and State of Illinois, party of the first part, and Lucy Blair Linn, of the said City of Chicago, party of the second part Witnesseth:

That the said party of the first part, in consideration of love and affection and One Dollar ($1) in hand paid by the party of the second part, the receipt whereof is hereby acknowledged, does hereby sell, assign, transfer and set over unto said party of the second part an interest amounting to Two Hundred Fifty Dollars ($250) in each month in addition to the assignment made under date of April 2nd, 1923, in the net income which the said party of the first part now is or may hereafter be, entitled to receive during his life from the Trustees under the Will of William Blair, Deceased, late of the said City of Chicago; and the said party [fol. 45] of the first part hereby authorizes and empowers said party of the second part, either in her own name or in the name of the said party of the first part, to receive and receipt to the Trustees under the Will of William Blair, Deceased, for Two Hundred Fifty Dollars ($250) in each month of the income and moneys which shall at any time become payable to said party of the first part under or by virtue of the terms and provisions of the said Will of William Blair, Deceased.

All payments hereunder shall be made in person to said party of the second part and not upon any written or verbal order nor upon any assignment, nor upon any transfer by operation of law, and shall cease upon the death of either party hereto.

In Witness Whereof the parties hereto have set their hands and seals the day and year first above written.

Edward T. Blair. (Seal.) Lucy Blair Linn. (Seal.)

Petitioner's Exhibit 6

This Indenture Made and entered into this first day of December, 1925, by and between Edward T. Blair of the City of Chicago, County of Cook, and State of Illinois, party of the first part, and Lucy Linn of the said City of Chicago, party of the second part, Witnesseth:

That the said party of the first part, in consideration of love and affection and One Dollar ($1) in hand paid by said

party of the second part, the receipt whereof he hereby acknowledged, does hereby sell, assign, transfer and set over unto said party of the second part an interest amounting to Five Hundred Dollars ($500) in each month in addition to the assignments already made, in the net income which the said party of the first part now is or may hereafter be, entitled to receive during his life from the Trustees under the Will of William Blair, Deceased, late of the said City of Chicago; and the said party of the first part hereby authorizes and empowers said party of the second part, either in her own name or in the name of the said party of the first part, to receive and receipt to the Trustees under the Will of William Blair, Deceased, for Five Hundred Dollars ($500) in each month of the income and moneys which shall at any time become payable to said party of the first part under or by virtue of the terms and provisions of the said Will of William Blair, Deceased.

[fol. 46] All payments hereunder shall be made in person to said party of the second part and not upon any written or verbal order nor upon any assignment nor upon any transfer by operation of law, and shall cease upon the death of either party hereto.

In Witness Whereof the parties hereto have set their hands and seals the day and year first above written.

Edward T. Blair. (Seal.) Lucy Blair Linn. (Seal.)

Petitioner's Exhibit 7

This Indenture Made and entered into this 1st day of September, A. D. 1924 by and between Edward T. Blair, of the City of Chicago County of Cook and State of Illinois, party of the first part, and Edith Blair, of the said City of Chicago, party of the second part, Witnesseth:

That the said party of the first part, in consideration of love and affection and One Dollar ($1) in hand paid by said party of the second part, the receipt whereof is hereby acknowledged, does hereby sell, assign, transfer and set over unto said party of the second part an interest amounting to Two Hundred Fifty Dollars ($250) in each month in addition to the assignment already made, in the net income which the said party of the first part now is or may hereafter be, entitled to receive during his life from the Trustees under the Will of William Blair, Deceased, late of the

said City of Chicago; and the said party of the first part hereby authorizes and empowers said party of the second part, either in her own name or in the name of the said party of the first part, to receive and receipt to the Trustees under the Will of William Blair, Deceased, for Two Hundred Fifty Dollars ($250) in each month of the income and moneys which shall at any time become payable to said party of the first part under or by virtue of the terms and provisions of the said Will of William Blair, Deceased.

All payments hereunder shall be made in person to said party of the second part and not upon any written or verbal order nor upon any assignment, nor upon any transfer by operation of law, and shall cease upon the death of either party hereto.

In Witness Whereof the parties hereto have set their hands and seals the day and year first above written.

Edward T. Blair. (Seal.) Edith Blair. (Seal.)

[fol. 47] Petitioner's Exhibit 8

This Indenture Made and entered into this first day of May, 1925 by and between Edward T. Blair, of the City of Chicago, County of Cook, and state of Illinois, party of the first part, and Edith Blair of the said City of Chicago, party of the second part, Witnesseth:

That the said party of the first part, in consideration of love and affection and One Dollar ($1) in hand paid by said party of the second part, the receipt whereof is hereby acknowledged, does hereby sell, assign, transfer and set over unto said party of the second part an interest amounting to Two Hundred Fifty Dollars ($250) in each month in addition to the assignments already made, in the net income which the said party of the first part now is or may hereafter be, entitled to receive during his life from the Trustees under the Will of William Blair, Deceased, late of the said City of Chicago; and the said party of the first part hereby authorizes and empowers said party of the second part, either in her own name or in the name of the said party of the first part, to receive and receipt to the Trustees under the Will of William Blair, Deceased, for Two Hundred Fifty Dollars ($250) in each month of the income and moneys which shall at any time become payable to said party of the first part under or by virtue of

the terms and provisions of the said Will of William Blair, Deceased.

All payments hereunder shall be made in person to said party of the second part and not upon any written or verbal order nor upon any assignment, nor upon any transfer by operation of law, and shall cease upon the death of either party hereto.

In Witness Whereof the parties hereto have set their hands and seals the day and year first above written.

Edward T. Blair. (Seal.) Edith Blair. (Seal.)

Petitioner's Exhibit 9

This Indenture Made and entered into this 1st day of September A. D. 1924 by and between Edward T. Blair, of the City of Chicago, County of Cook and State of Illinois, party of the first part, and Seymour Blair, of the said City of Chicago, party of the second part Witnesseth:

That the said party of the first part, in consideration of [fol. 48] love and affection and One Dollar ($1) in hand paid by said party of the second part, the receipt whereof is hereby acknowledged, does hereby sell, assign, transfer and set over unto said party of the second part an interest amounting to Two Hundred Fifty Dollars ($250.00) in each month in addition to the assignment already made, in the net income which the said party of the first part now is of or may hereafter be, entitled to receive during his life from the Trustees under the Will of William Blair, deceased, late of the said City of Chicago; and the said party of the first part hereby authorizes and empowers said party of the second part, either in his own name or in the name of the said party of the first part, to receive and receipt to the Trustees under the Will of William Blair, Deceased, for Two Hundred Fifty Dollars ($250.00) in each month of the income and moneys which shall at any time become payable to said party of the first part under or by virtue of the terms and provisions of the said Will of William Blair, deceased.

All payments hereunder shall be made in person to said party of the second part and not upon any written or verbal order nor upon any assignment, nor upon any transfer by

operation of law, a-d shall cease upon the death of either party hereto.

In Witness Whereof the parties hereto have set their hands and seals the day and year first above written.

Edward T. Blair. (Seal.) (Edward) Seymour Blair. (Seal.)

Petitioner's Exhibit 10

This Indenture Made and entered into this 2nd day of January, A. D. 1925, by and between Edward T. Blair, of the City of Chicago, County of Cook and State of Illinois, party of the first part, and Seymour Blair, of the said City of Chicago, party of the second part, Witnesseth:

That the said party of the first part, in consideration of love and affection and One Dollar ($1.00) in hand paid by said party of the second part, the receipt whereof is hereby acknowledged, does hereby sell, assign, transfer and set over unto said party of the second part an interest amounting to Five Hundred Dollars ($500.00) in each month in addition to the assignments already made, in the net income which the said party of the first part now is or may hereafter be, entitled to receive during his life from the Trustees [fol. 49] under the Will of William Blair, Deceased, late of the said City of Chicago; and the said party of the first part hereby authorizes and empowers said party of the second part, either in his own name or in the name of the said party of the first part, to receive and receipt to the Trustees under the Will of William Blair, Deceased, for Five Hundred Dollars ($500.00) in each month of the income and moneys which shall at any time become payable to said party of the first part under or by virtue of the terms and provisions of the said Will of William Blair, Deceased.

All payments hereunder shall be made in person to said party of the second part and not upon any written or verbal order nor upon any assignment, nor upon any transfer by operation of law, and shall cease upon the death of either party hereto.

In Witness Whereof the parties hereto have set their hands and seals the day and year first above written.

Edward T. Blair. (Seal.) (Edward) Seymour Blair. (Seal.)

Petitioner's Exhibit 11

This Indenture Made and entered into this 2nd day of January A. D. 1925 by and between Edward T. Blair, of the City of Chicago County of Cook and State of Illinois, party of the first part, and William McCormick Blair, of the said City of Chicago, party of the second part Witnesseth:

That the said party of the first part, in consideration of love and affection and One Dollar ($1) in hand paid by said party of the second part, the receipt whereof is hereby acknowledged, does hereby sell, assign, transfer and set over unto said party of the second part an interest amounting to Four Thousand Dollars ($4000) in each calendar year in the net income which the said party of the first part now is or may hereafter be, entitled to receive during his life from the Trustees under the Will of William Blair, Deceased, late of the said City of Chicago; and the said party of the first part hereby authorizes and empowers said party of the second part, either in his own name or in the name of the said party of the first part, to receive and receipt for to the Trustees under the Will of William Blair, Deceased, for Four Thousand Dollars ($4000) in each year of the income and moneys which shall at any time become payable to said party of the first part under or by virtue of the terms and provisions of the said Will of William Blair, Deceased.

[fol. 50] All payments hereunder shall be made in person to said party of the second part and not upon any written or verbal order now upon any assignment, nor upon any transfer by operation of law, and shall cease upon the death of either party hereto.

In Witness Whereof the parties hereto have set their hands and seals the day and year first above written.

Edward T. Blair. (Seal. W. McC. Blair. (Seal.)

Petitioner's Exhibit 12

This Indenture Made and entered into this 2nd day of January A. D. 1926 by and between Edward T. Blair of the City of Chicago, County of Cook and State of Illinois, party of the first part, and William McCormick Blair, of the said City of Chicago, party of the second part Witnesseth:

That the said party of the first part, in consideration of love and affection and One Dollar ($1) in hand paid by said party of the second part, the receipt whereof is hereby acknowledged, does hereby sell, assign, transfer and set over unto said party of the second part an interest amounting to Two Thousand Dollars ($2000) in each calendar year in addition to the assignment already made, in the net income which the said party of the first part now is or may hereafter be, entitled to receive during his life from the Trustees under the Will of William Blair, Deceased, late of the said City of Chicago; and the said party of the first part hereby authorizes and empowers said party of the second part, either in his own name or in the name of the said party of the first part, to receive and receipt for to the Trustees under the Will of William Blair, Deceased, for Two Thousand Dollars ($2000) in each year of the income and moneys which shall at any time become payable to said party of the first part under or by virtue of the terms and provisions of the said Will of William Blair, Deceased.

All payments hereunder shall be made in person to said party of the second part and not upon any written or verbal order nor upon any assignment, nor upon any transfer by operation of law, and shall cease upon the death of either party hereto.

In Witness Whereof the parties hereto have set their hands and seals the day and year first above written.

Edward T. Blair. W. McC. Blair.

[fol. 51] Petitioner's Exhibit 13

To Edward Tyler Blair and William McCormick Blair, as Trustees under the Last Will and Testament of William Blair, Deceased:

You are hereby notified that I have this day assigned, transferred and set over to my daughter, Lucy Blair Linn,

an interest amounting to Six Thousand Dollars ($6,000.00) for the remainder of the current calendar year, and Nine Thousand Dollars ($9,000.00) in each calendar year thereafter in the net income which may become due and payable to me during my life from you as Trustees under the Last Will and Testament of William Blair, Deceased; and that said Lucy Blair Linn is authorized to sign and receipt to you, either in her own name, or in my name, for Six Thousand Dollars ($6,000.00) for the remainder of the current calendar year, and Nine Thousand Dollars ($9,000.00) in each calendar year thereafter of the income and moneys which shall become payable to me during my life under or by virtue of the terms and provisions of said Last Will and Testament of William Blair, Deceased; and that the said receipts of said Lucy Blair Linn for the income paid to her in pursuance hereof shall be a sufficient voucher for the income so paid to her, and shall have the like effect as though such receipts and vouchers were signed by me in my own proper person, and you are hereby requested and directed to pay to said Lucy Blair Linn out of the net income of said estate Six Thousand Dollars ($6,000.00) during the remainder of the current calendar year, and Nine Thousand Dollars ($9,000.00) in each calendar year thereafter, said payments to be in such installments as may be convenient to said Trustees.

In Witness Whereof I have hereunto set my hand and seal this 2nd day of April, A. D. 1923.

Edward T. Blair. (Seal.)

Accepted this 2d day of April, A. D. 1923.

Edward T. Blair, W. McC. Blair, As Trustees under the Last Will and Testament of William Blair, Deceased.

[fol. 52] PETITIONER'S EXHIBIT No. 14

U. S. Board of Tax Appeals

Admitted in Evidence May 2, 1934

Docket Nos. 42313, 63741

No. 37406

IN THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT, FEBRUARY TERM, A. D. 1934

EDWARD TYLER BLAIR and WILLIAM McCORMICK BLAIR, as Trustees Under the Last Will and Testament of William Blair, Deceased, Complainants-Appellees,

vs.

LUCY BLAIR LINN, EDITH BLAIR, EDWARD SEYMOUR BLAIR, William McCormick Blair and Edward Tyler Blair, Individually, Defendants-Appellants

Appeal from Superior Court, Cook County

Honorable Denis E. Sullivan, Presiding Judge

Abstract of Record

Wilson & McIlvaine, Attorneys for Appellants.

[fol. 53] Placita.

Bill of complaint as follows:

Your orators, Edward Tyler Blair and William McCormick Blair, as trustees under the last will of William Blair, deceased, respectfully represent unto Your Honors as follows:

1. That said William Blair was in his lifetime a resident of the City of Chicago, in the County of Cook and State of Illinois, and died on or about the 10th day of May, 1899, leaving a last will and testament dated July 27, 1888, which was duly admitted to probate by the Probate Court of Cook County in the State of Illinois, a copy of which said last will and testament is attached hereto marked Exhibit A and made a part of this bill; that the estate of William

Blair, deceased, has been duly and fully administered in said Probate Court in accordance with the terms of said last will and testament, and said estate has been declared settled by said court.

2. That by paragraph fourteenth of said last will William Blair, the testator, provided, amongst other matters, [fol. 54] for the creation of a trust estate in the hands of the trustees named therein, to wit, Chauncey J. Blair and Edward Tyler Blair, and the said Chauncey J. Blair is now deceased and has been succeeded by William McCormick Blair as trustee under the terms of said last will, and that your orators have accepted the trust imposed upon them by said last will, and have been and are now acting as trustees of the residuary estate of the said decedent under said last will.

3. That by the terms of said paragraph fourteenth of said last will it was provided that Sarah Maria Blair, the wife of the testator, was to receive one-half of the net income of the said trust estate, and Edward Tyler Blair, the son of the testator, was to receive the other one-half, and after the death of Sarah Maria Blair, the wife of the testator, Edward Tyler Blair, the said son, was to receive the whole of the net income of the said trust estate for and during the full term of his natural life.

4. That by the terms of Section H of said paragraph fourteenth of said last will the testator provided that after the death of the above mentioned life beneficiaries the trustees should distribute the trust estate "to the child or children of my said son and to descendants of any deceased child or children of his by right of representation share and share alike"; that this provision for the distribution of the trust estate becomes effective if any child or children or the descendants of any deceased child or children of the said Edward Tyler Blair, the said son of the testator, survive the life tenants, and that Edward Tyler Blair is the last survivor of said life tenants. That Lucy Blair Linn, Edith Blair, Edward Seymour Blair, and William McCormick Blair, hereinafter named defendants herein, are the sole and only children of the said Edward Tyler Blair, and that said children and their descendants are the persons who will be entitled to said trust estate if they survive the said Edward Tyler Blair, and that these

remaindermen are the same persons to whom Edward Tyler Blair has assigned part of his interest in the said trust as hereinafter more fully set forth.

5. That Sarah Maria Blair, the wife of the testator, [fol. 55] died on or about the 13th day of March, 1923, and thereafter Edward Tyler Blair, the said son of the testator, became and was entitled to received the whole of the net income of the said trust estate for and during the full term of his natural life.

6. That paragraph twentieth of said last will of William Blair, deceased, provides:

"I do hereby declare and direct that the income from said trust fund and estate, which is herein ordered to be, from time to time as the same shall be received, paid to my said wife and to my said son and to his said wife and to their children and descendants of children in the cases aforesaid, shall be paid to them directly upon their separate order and receipt therefor, for their sole and separate use respectively, and that the same shall not be nor be made nor held in any manner nor by any proceedings whether in law or equity, while yet in the hands of said trustees, liable for or subject to the payment of any of the debts or obligations of either of the persons entitled to the same as above herein set forth."

7. That on or about April 2, 1923, the said Edward Tyler Blair, by an instrument in writing, assigned and transferred to his daughter, Lucy Blair Linn, for her life, an interest amounting to six thousand dollars ($6,000) for the remainder of the calendar year 1923 and nine thousand dollars ($9,000) in each calendar year thereafter in the net income which Edward Tyler Blair was entitled to receive during his lifetime from the trustees under the last will and testament of William Blair, and that a copy of said assignment is attached hereto and marked Exhibit B, and made a part of this bill.

8. That on the same date, to wit, April 2, 1923, Edward Tyler Blair notified your orators, the then trustees under the last will of William Blair, in writing, of said assignment to Lucy Blair Linn, and your orators, in their capacities as trustees, then and there accepted said assignment

and a copy of said notice and acceptance is attached hereto and marked Exhibit C, and made a part of this bill.

9. That on the same date, to wit, April 2, 1923, Edward Tyler Blair likewise assigned and transferred to his daugh-
[fol. 56] ter, Edith Blair, an interest amounting to nine thousand dollars ($9,000) in each calendar year (including the remainder of the calendar year 1923) in the net income which Edward Tyler Blair was entitled to receive from your orators, and likewise further assigned and transferred to Edward Seymour Blair, his son, an interest amounting to six thousand dollars ($6,000) in each calendar year (including the remainder of the calendar year 1923) in the net income which Edward Tyler Blair was entitled to receive during his life from your orators. That on September 1, 1924, Edward Tyler Blair likewise assigned and transferred to his daughters, Edith Blair and Lucy Blair Linn, and to his son Edward Seymour Blair, interests amounting to two hundred fifty dollars ($250) per month in each calendar year (including the remainder of the calendar year 1924) in the net income which Edward Tyler Blair was entitled to receive from your orators. That on, to wit, January 2, 1925, Edward Tyler Blair likewise assigned and transferred to his son Edward Seymour Blair an interest amounting to five hundred dollars ($500) per month, and to his son William McCormick Blair an interest amounting to four thousand dollars ($4,000) per year, in the net income which Edward Tyler Blair was entitled to receive from your orators. That on, to wit, May 1, 1925, Edward Tyler Blair likewise assigned and transferred to his daughter Edith Blair an interest amounting to two hundred fifty dollars ($250) per month in each calendar year (including the remainder of the calendar year 1925) in the net income which Edward Tyler Blair was entitled to receive from your orators. That on, to wit, December 1, 1925, Edward Tyler Blair likewise assigned and transferred to his daughter Lucy Blair Linn an interest amounting to five hundred dollars ($500) per month in each calendar year (including the remainder of the calendar year 1925) in the net income which Edward Tyler Blair was entitled to receive from your orators. That on, to wit, January 2, 1926, said Edward Tyler Blair likewise assigned and transferred
[fol. 57] to his son William McCormick Blair an interest

amounting to two thousand dollars ($2,000) in each calendar year in the net income which Edward Tyler Blair was entitled to receive from your orators. That on, to wit, December 20, 1929, said Edward Tyler Blair likewise assigned and transferred to his daughter Edith Blair an interest amounting to two hundred fifty dollars ($250) per month in each calendar year in the net income which Edward Tyler Blair was entitled to receive from your orators. That all of said assignments in this paragraph referred to were in all respects identical to the aforesaid assignment to Lucy Blair Linn identified herein and attached hereto as Exhibit B except as to their respective dates and except as to the amount of the interest assigned, (which in each case has been described in this paragraph).

10. That on, to wit, the respective dates borne by the assignments and transfers referred to in paragraph 9 hereof, Edward Tyler Blair likewise notified your orators, the then trustees under the last will and testament of William Blair, in writing, of said assignments, and your orators in writing then and there accepted said assignments, and said notices and acceptances, except as to their respective dates, were identical to the notices and acceptances given with respect to the assignment of Lucy Blair Linn, and identified and attached hereto as Exhibit C, except as to the amount of the interest assigned, which in each case has heretofore been described in this bill.

11. That since the execution of said assignments your orators have paid over to Lucy Blair Linn, Edith Blair, William McCormick Blair, and Edward Seymour Blair part of the net income of the trust estate pursuant to said assignments, and have at all times recognized the validity of said assignments, and said assignees have at all times and do now demand that your orators pay to said assignees part of the net income of the trust estate pursuant to the terms of said assignments.

12. That in certain proceedings involving a dispute concerning income taxes for the year 1923 between the Commissioner of Internal Revenue of the United States, as petitioner, and Edward Tyler Blair, as respondent, the [fol. 58] United States Circuit Court of Appeals for the Seventh Circuit held on June 23, 1932, that said assignments of April 2, 1923, were void as a matter of law, and

that the writ of certiorari to review said decision has been denied by the Supreme Court of the United States. The proceeding in which the United States Circuit Court of Appeals for the Seventh Circuit held the assignments of April 2, 1923, void, arose as follows: Your orators have from time to time filed with the Collector of Internal Revenue in Chicago reports of the income of said trust in the manner required by the various Revenue Laws of the United States. In said reports, your orators have reported the amounts of income distributed to Edward Tyler Blair and to Lucy Blair Linn, Edith Blair, Edward Seymour Blair, and William McCormick Blair by virtue of said assignments.

12a. That the Commissioner of Internal Revenue, in auditing the reports of your orators and the income tax returns of Edward Tyler Blair, ruled that all of the income of said trust was distributable to Edward Tyler Blair, notwithstanding said assignments, and that the distribution shown on the reports of your orators was incorrect, and that Edward Tyler Blair should have paid an income tax on the full amount of the income of said trust.

12b. That said Edward Tyler Blair appealed from this ruling to the United States Board of Tax Appeals, which board reversed the ruling of the Commissioner. From this decision the Commissioner appealed to the United States Circuit Court of Appeals, for the Seventh Circuit, which reversed the Board of Tax Appeals and affirmed the ruling of the Commissioner of Internal Revenue. In so doing, the court held that the interest of Edward Tyler Blair, under the will of William Blair, could not be assigned in whole or in part by Edward Tyler Blair, and therefore all the income of the trust is distributable to Edward Tyler Blair, notwithstanding said assignments.

12c. That prior to the said decision, and at the time of the execution and delivery of the assignment first above mentioned, your orators were advised by counsel that the proper construction of the will of William Blair, under the [fol. 59] law of Illinois, was that the interest of Edward Tyler Blair could be assigned in whole or in part by him, and pursuant to this advice your orators accepted said assignments and distributed income to the assignees as aforesaid.

12d. That your orators are now advised by counsel that the said decision of the United States Circuit Court of Appeals raises a serious doubt as to the validity of said assignments under the law of Illinois, and that, further, the said decision may be binding on your orators as trustees as aforesaid, and that they may be personally liable if they distribute the income of the trust to persons other than Edward Tyler Blair in accordance with the provisions of said assignments, and that accordingly the rights of the situation demand that your orators as trustees refuse to make payments under the said assignments to the persons there named as assignees. On the other hand, the said Lucy Blair Linn, Edward Seymour Blair, Edith Blair, and William McCormick Blair contend that neither your orators as trustees nor themselves, or any of them, were parties to the proceedings before the Circuit Court of Appeals, and that they are not bound by its decision, and on the contrary, that the said assignments are valid and enforceable and that your orators are obliged to pay to them the income specified in said assignments, and they demand said payments be made to them and not to Edward Tyler Blair.

12e. That the United States Circuit Court of Appeals, Seventh Circuit, purported to construe said will according to the law of Illinois, and relied principally upon the decisions of the Supreme Court of Illinois in

Bennett v. Bennett, 217 Ill. 434;
Wagner v. Wagner, 244 Ill. 401;
Wallace v. Foxwell, 250 Ill. 616;
Hopkinson v. Swain, 284 Ill. 11.

Said United States Circuit Court of Appeals, Seventh Circuit, held "that the trust created by the will in the instant case is a spendthrift trust and that respondent (Edward Tyler Blair) had no right to alienate it".

12f. That the beneficiaries under said assignments claim that certain decisions of the Supreme Court of Illinois [fol. 60] show that a restraint on alienation cannot be implied and that therefore a restraint on voluntary alienation by Edward Tyler Blair cannot be implied from the express restraint on involuntary alienation contained in said paragraph fourteenth of said will.

12g. That your orators are informed that Edward Tyler Blair relied on the cases of

Binns v. La Forge, 191 Ill. 598, and
Bryan v. Howland, 98 Ill. 625,

and on two decisions in Massachusetts, directly on the question, namely

Ames v. Clarke, 108 Mass. 573, and
Boston Safety Deposit Trust Co. v. Luke, 108 N. E. 64.

12h. That your orators are informed and believe that if they follow the decision of the United States Circuit Court of Appeals and refuse to distribute to the assignees the part of the income of the trust assigned to them, but distribute all the income to Edward Tyler Blair, your orators will be subjected to a multiplicity of suits by said assignees demanding payment in accordance with the assignments.

13. That the citizenship of William Blair, the testator, and all of the parties hereto, and the location of the trust property and creation and administration of the said trust, are all in the State of Illinois, and that in view of the doubts and questions in connection with the assignment by Edward Tyler Blair of his interest in the income in said trust estate, where the instrument creating said trust imposes restrictions as to the subjection of the income thereof to payment of debts of the beneficiary, your orators are embarrassed in connection with the proper management of said trust, and it is essential to the interest of the beneficiary named in said trust and said trust estate and the assignees of said beneficiary to have all such doubts and questions removed and set at rest.

[fol. 61] 14. That each one of said assignments provides that it shall cease upon the death of Edward Tyler Blair or of the assignee named in each assignment; that paragraph fourteenth of said last will of William Blair, deceased, provides for the disposition of the trust after the death of Edward Tyler Blair and upon certain contingencies to certain parties therein named, but that none of said parties have any interest in the validity of said assignments or in this proceeding, and that their interests will not and cannot be affected by this proceeding.

15. That in addition to your orators, the following named persons, to wit, Lucy Blair Linn, Edith Blair, Edward Seymour Blair, William McCormick Blair, and Edward Tyler Blair, are the only persons now in being who are or may be interested in the validity of said assignments, and that the foregoing persons, together with your orators as the residuary trustees named in said will, in equity stand for and represent all persons who do or may have any interest in the validity of said assignments.

Forasmuch, therefore, as your orators are without remedy in the premises except in a court of equity, your orators pray that the said Lucy Blair Linn, Edith Blair, Edward Seymour Blair, William McCormick Blair, and Edward Tyler Blair, who are made parties defendant to this bill, may be required to make full and direct answer to the same, but not under oath, the answer under oath being hereby waived, and that a decree may be entered construing the said will of William Blair, deceased, as to the power of the beneficiary of said trust estate voluntarily to convey and assign a part of his beneficial and equitable interest in said trust and thus alienate accruing income in the hands of your orators, and as to the validity of said assignments, and as to whether your orators should pay to said assignees part of the net income of the trust estate pursuant to said assignments, and that your orators may have such other and further or different relief as shall be agreeable to equity.

May it please Your Honors to grant the writ of summons in chancery directed to the Sheriff of the County of [fols. 62-71] Cook, demanding that he summon the defendants, Lucy Blair Linn, Edith Blair, Edward Seymour Blair, William McCormick Blair, and Edward Tyler Blair to appear before the said court on the first day of the next April term thereof to be held at the Court House in Chicago, Illinois, in the County of Cook aforesaid, and then and there to answer to this bill.

Exhibit A omitted. See exhibit 1, printed side page 32, ante.

[fol. 72] Exhibit B omitted. See exhibit 2, printed side page 42, ante.

[fol. 73] Exhibit "C" omitted. See exhibit 13, printed side page 51, ante.

[fol. 74] Appearance of Lucy Blair Linn, Edith Blair, Edward Seymour Blair and William McCormick Blair, individually—filed June 6, 1933.

Answer of Defendants Lucy Blair Linn, Edith Blair, Edward Seymour Blair and William McCormick Blair, Individually—Filed June 6, 1933

(1) Admits the facts alleged in the bill of complaint.

(2) Admits that the decision of the Circuit Court of Appeals raises a doubt as to the validity of the assignments and said doubt requires a construction of the will of William Blair.

(3) Alleges that the will of William Blair does not constitute a restraint on the power of voluntary alienation by Edward Tyler Blair of his interest in the trust estate.

Defendants join in requesting a construction of the will.

Alias summons and return showing service on Edward Tyler Blair on June 9, 1933.

Order entered September 20, 1933, defaulting Edward [fol. 75] Tyler Blair and ordering that the bill of complaint be taken as confessed against him.

Decree entered January 16, 1934, as follows:

This cause came on to be h-ard on the bill of complaint of Edward Tyler Blair and William McCormick Blair as trustees under the last will and testament of William Blair, deceased, and on the answer thereto of Lucy Blair Linn, Edith Blair, Edward Seymour Blair and William McCormick Blair, individually.

And the court, taking all of the facts alleged in said bill of complaint and admitted by said answer to be true, and having heard the arguments of counsel and being fully advised in the premises now finds as follows:

1. Edward Tyler Blair, individually, was duly served with summons herein at least 20 days before the first Monday of January, 1934, and Lucy Blair Linn, Edith Blair, Edward Seymour Blair and William McCormick Blair, individually, have entered their appearance herein and the court has jurisdiction of all the parties hereto.

2. Edward Tyler Blair, individually, has not entered any appearance and has not filed any exception, demurrer, plea or answer to the bill of complaint herein and was by order of this court entered September 20, 1933, duly defaulted and the cause taken as confessed against him.

3. The complainants, Edward Tyler Blair and William McCormick Blair, are the duly appointed and acting trustees under the last will and testament of William Blair who died a resident of Cook County, Illinois, on or about the 10th day of May, 1899. Said trustees are both residents of Cook County, Illinois, and the court has jurisdiction of the trust created by said will.

4. Said William Blair by his said will created a trust estate of which said Edward Tyler Blair is one of the beneficiaries and on the death of his mother on or about March 13, 1923, he became entitled to the whole of the net income for the remainder of his natural life.

5. On or about April 2, 1923, said Edward Tyler Blair, by instruments in writing assigned to said Lucy Blair Linn, [fol. 76] Edith Blair and Edward Seymour Blair, three of his children, part of his life interest in said trust estate and by similar instruments in writing dated September 1, 1924, January 2, 1925, May 1, 1925, December 1, 1925, December 20, 1925, and January 2, 1926, he assigned additional parts of his life interest in said trust to said children and to William McCormick Blair, his other child. Notice of each of said assignments was duly given to the trustees, was accepted by them, and the proper part of the income was thereafter paid by the trustees from time to time directly to said children of Edward Tyler Blair.

6. Said trustees at that time believed that under the proper construction of the will of said William Blair, said Edward Tyler Blair could validly assign part of his interest in said trust estate to his said children.

7. On or about June 23, 1932, the United States Circuit Court of Appeals for the Seventh Circuit, in a case relating to the income tax of said Edward Tyler Blair, decided that his interest in said trust estate was not assignable and therefore said assignments were invalid.

8. Neither the trustees of said trust estate nor said assignees were parties to said case in the United States Circuit Court of Appeals for the Seventh Circuit and they were not bound by said decision. Said decision raised a reasonable doubt in the minds of said trustees as to the proper distribution of the income of said trust estate as between said Edward Tyler Blair and his said assignees and they properly filed their bill of complaint herein praying

this court to construe said will of William Blair as to the power of said Edward Tyler Blair voluntarily to convey and assign a part of his beneficial and equitable interest in said trust estate to his said children and as to the validity of said assignments to them.

9. This court has jurisdiction to construe said will as prayed in said bill of complaint and to determine the validity of said assignments and has jurisdiction of the subject matter hereof.

10. Paragraph Twenty of said will of William Blair provides:

"Twenty: I do hereby declare and direct that the income from said trust fund and estate which is herein ordered to be, from time to time as the same shall be received, paid to my said wife and to my said son and to his said wife and [fol. 77] to their children and descendants of children in the cases aforesaid, shall be paid to them directly upon their separate order and receipt therefor, for their sole and separate use respectively, and that the same shall not be nor be made nor held in any manner nor by any proceedings whether in law or equity while yet in the hands of said trustees liable for or subject to the payment of any of the debts or obligations of either of the persons entitled to the same as above herein set forth."

11. Said Paragraph Twenty of said will of William Blair, when properly construed, is an absolute restraint on the right of said Edward Tyler Blair to assign his interest or any part thereof prior to the time that the income of said trust estate is distributed.

12. The assignments hereinbefore described are assignments of a part of the interest of said Edward Tyler Blair in said trust estate, including income prior to the time that it is distributed and said assignments are therefore invalid.

The court being now fully advised in the premises, It Is Ordered, Adjudged and Decreed by the Court:

First. Paragraph Twenty of the will of William Blair, when properly construed, is an absolute restraint on the right of said Edward Tyler Blair to assign his interest or any part thereof prior to the time that the income of said trust estate is distributed.

Second. The assignments by Edward Tyler Blair to Lucy Blair Linn, dated April 2, 1923, September 1, 1924, and December 1, 1925, to Edith Blair dated April 2, 1923, September 1, 1924, May 1, 1925, and December 20, 1925, to Edward Seymour Blair dated April 2, 1923, September 1, 1924, and January 2, 1925, and to William McCormick Blair dated January 2, 1925, and January 2, 1926, are all invalid.

The court reserves jurisdiction of this cause and of the parties thereto for the purpose of determining the allowances to be made out of said trust estate to the several parties for their costs, disbursements and solicitors' fees in this proceeding.

Denis E. Sullivan, Judge.

Enter:
January 16, 1934.

[fol. 78] Notice of appeal—filed January 16, 1934.
Notice of appearance.
Notice of appearance.
Præcipe for trial court record.
Certificate of Clerk of Superior Court of Cook County—January 17, 1934.

Assignment of Errors

Now come the appellants, Lucy Blair Linn, Edith Blair, Edward Seymour Blair and William McCormick Blair, by Wilson & McIlvaine, their attorneys, and show to the court that in the proceedings upon said cause in the Superior Court of Cook County, there was and is manifest error as follows:

(1) The court erred in its construction of the will of William Blair, deceased.

(2) The court erred in finding and also in decreeing that paragraph twenty of said will is an absolute restraint on the right of Edward Tyler Blair to assign his interest, or, or any part thereof, prior to the time that the income of said trust estate is distributed.

(3) The court erred in finding and also in decreeing that the assignments by Edward Tyler Blair to Lucy Blair Linn, dated April 2, 1923, September 1, 1924, and December 1, 1925, to Edith Blair dated April 2, 1923, September 1, 1924, May 1, 1925, and December 20, 1925, to Edward Seymour Blair dated April 2, 1923, September 1, 1924, and

January 2, 1925, and to William McCormick Blair dated January 2, 1925, and January 2, 1926, are all invalid.

(4) The decree of the court below is contrary to the law.

Wilson & McIlvaine, Attorneys for Appellants.

[fol. 79] PETITIONER'S EXHIBIT 15

U. S. Board of Tax Appeals

Docket 42313—63741

Admitted in Evidence May 2, 1934

At a Term of the Appellate Court, Begun and held at Chicago, on Tuesday, the Sixth day of February in the year of our Lord One Thousand Nine Hundred and Thirty-four within and for the First District of the State of Illinois.

Present: Hon. David F. Matchett Presiding Justice. William H. McSurely Justice. John M. O'Connor Justice.

Sheldon W. Govier, Clerk. William D. Meyering, Sheriff.

Be It Remembered, That on the 5th day of March A. D. 1934, there was filed in the office of the Clerk of said Court, an opinion of said Court, in words and figures, following to-wit:

No. 37406

Appeal from Cook Superior

Error to ——

EDWARD TYLER BLAIR and WILLIAM MCCORMICK BLAIR, as Trustees under the Last Will and Testament of William Blair, Deceased, Appellees,

vs.

LUCY BLAIR LINN, EDITH BLAIR, EDWARD SEYMOUR BLAIR, William McCormick Blair and Edward Tyler Blair, Appellants

• • • (Caption) • • • •

Mr. Justice MCSURELY delivered the opinion of the Court.

This appeal presents the question whether Edward Tyler Blair, a defendant, could assign a portion of the trust in-

come devised to him by his father's will before he received it. The trustees filed their bill asking the court to construe [fol. 80] the will in this respect. The Superior court held that the law did not permit Mr. Blair to do this, and the defendants appeal to this court.

William Blair, deceased, by his will created a trust estate, naming as trustees his nephew, Chauncey Blair (succeeded by complainant William McCormick Blair) and his son, Edward Tyler Blair; by the terms of the trust the wife of the testator was to receive one-half of the net income of the trust estate during her life, and his son, Edward Tyler Blair was to receive the other half during his life; after the death of the testator's wife the son was to receive the whole income of the trust during his life; at his death the corpus of the trust to be distributed among his children.

Testator's wife subsequently died, and thereafter Mr. Blair executed certain written assignments of portions of his income to his children, aggregating approximately $60,000 a year; the trustees accepted these assignments and accordingly from time to time paid over the portions of the income so assigned to his children.

The Commissioner of Internal Revenue sought to have Mr. Blair pay taxes on the entire amount of the income from his father's estate, regardless of the fact that approximately one-half of it had been assigned to his children. The Board of Tax Appeals recognized these assignments and held that Mr. Blair should pay an income tax only on the amount actually received by him. The Commissioner of Internal Revenue appealed to the Circuit court of Appeals for the Seventh circuit, which court reversed the order of the Board, holding that Mr. Blair could not lawfully make the assignments to his children and that he should be taxed upon the entire income of his father's estate. Commissioner of Internal Revenue v. Blair, 60 Fed. (2nd) 340. The children, who are the assignees from Mr. Blair and also the remaindermen after his life estate, were not before that court. The Federal court did not adjudicate the property rights but decided only the amount of the income of Mr. Blair which should be taxed. That court recognized that those rights were to be determined by the courts of Illinois, citing Spindle v. Shreve, 111 U. S. 542. In the recent case of Freuler v. Helvering, 54 Sup. Ct. Rep. 308, the Supreme court holds that the decision of the state court determining

the property rights of the taxpayer is conclusive in determining his federal income tax although the Federal court in the income tax case had reached a different result as to the same property rights. It follows, therefore, that al- [fol. 81] though the Federal court has construed the instant will, and certiorari to the Supreme court of the United States has been denied, yet this court, while giving weight to the opinion of the Federal court, must use its own judgment in determining whether the assignments in question are permissible under the law of Illinois.

The particular paragraph of the will which the Federal court held prohibits these assignments is as follows:

"I do hereby declare and direct that the income from said trust fund and estate which is herein ordered to be, from time to time, as the same shall be received, paid to my said wife and to my said son and to his said wife and to their children and descendants of children in the cases aforesaid, shall be paid to them directly upon their separate order and receipt therefor, for their sole and separate use respectively, and that the same shall not be nor be made nor held in any manner nor by any proceedings whether in law or equity while yet in the hands of said trustees liable for or subject to the payment of any of the debts or obligations of either of the persons entitled to the same as above herein set forth."

As a general proposition, restraints on alienation are looked upon with disfavor by the Illinois courts. Davis v. Hutchinson, 282 Ill. 523; Merchants Loan & Trust Co. v. Patterson, 308 Ill. 319. However, there are Illinois cases which sustain restraints on alienation where the same is clearly expressed in the document. In Steib v. Whitehead, 111 Ill. 247, the restriction was that the income should be paid to the daughter of the testator "in person, and not upon any written or verbal order, nor upon any assignment or transfer" by her. In Congress Hotel v. Martin, 312 Ill. 318, the will specifically provided that the income should be paid only into the hands of the beneficiaries, in person, "and not upon any written or verbal order, nor upon any assignment or transfer thereof by said beneficiaries, or by operation of law." The following cases were also cited by the Federal court, but none of them involved the question of alienation by a beneficiary. Bennett v. Bennett, 217

Ill.. 434, involved an ordinary trust fund from which the beneficiary was to receive only the income; he filed a bill in chancery alleging that he was in debt and needed the corpus of the trust. The court dismissed his bill, saying that the purpose of the trust had not been completed. Wal- [fol. 82] lace v. Foxwell, 230 Ill. 616, involved the question whether the trustee under the will should pay the income to the son of the testator and his wife in equal shares, or all of it to the wife. The court found there was no vested interest in the son. In Jones v. Harrison, 7 Fed. (2nd) 461, it was held that the interest of the beneficiary did not pass to the trustee in bankruptcy. In Hartley v. Heirs of Wyatt, 281 Ill. 321, the beneficiary under a will persuaded the trustee to convey a farm to him. The court held the trust was active and the trustee had no power to do this. So also in King v. King, 163 Ill., 273, Wagner v. Wagner, 244 Ill. 101, and Leary v. Kerber, 255 Ill. 433, respectively, the question of alienation by a beneficiary was not involved.

The Federal court seems to have relied largely upon the decision in Hopkinson v. Swain, 284 Ill. 11. There the trustees were ordered to pay the income to the beneficiary, a daughter, "directly, free and exempt from the power and control of any husband and from liabilities for any debts or engagements." This restriction clearly evidenced the intention of the testator that the husband of his daughter should have no control or power over her income; however, the daughter joined with her husband in making an assignment of her interest. The court held it invalid because of this restrictive provision. In other words, the assignment of the husband and daughter was precisely what the testator intended to prevent. The instant case is quite different. Here the testator intended that his grandchildren should have the benefit of the income from his estate upon the death of his son. The assignments are consistent with the intention of the testator as expressed in the will.

Moreover, the will in the Hopkinson case, as noted in the opinion (page 20) had already been construed by the Supreme court of Pennsylvania, the state where it was made, as creating a spendthrift trust, limiting the rights of the beneficiaries. Ewalt v. Davenhill et al., 257 Pa. St. 365.

While our Supreme court has decided that restraints on the rights of creditors will be given effect, and also, that an expressed restraint on alienation will be enforced, in no

case has it been held that an implied restraint will be enforced.

In Bisna v. LaForge, 191 Ill. 598, the life beneficiary assigned her interest as security for her debt; a creditor sought to realize on this and was met with the claim that the assignment was invalid; there was no language in the [fol. 83] will restricting alienation but the beneficiary claimed that the statute, Chap. 22, sec. 49 (Cahill) denied to creditors of a cestui que trust the right to seize income in the hands of a trustee, hence her assignment to a creditor was void. The Supreme court held that while a creditor could not seize the income, her voluntary alienation to a creditor was valid, saying that the statute "is not designed to protect the trust fund from the voluntary alienation of the cestui que trust, and there being no restriction in this will, there is no reason why Gertrude M. Talbot (the life beneficiary) might not in equity assign said income, or a part thereof, to James Ryan (the creditor) as security for a debt which she owed him."

In O'Hare v. Johnston, 273 Ill. 458, the court had before it the question whether a certain trust was a spendthrift trust, with restraint upon alienation by the beneficiary, a son, of his interest in the trust. The court said that there was no language in the will to that effect, and, citing the fact that the testator in the same will had given the son large sums of money and had appointed him one of his executors, said that the testator would hardly have done this if he had considered the son a person not to be trusted with business matters, and refused to construe the trust document as a restraint upon alienation.

William Blair had complete confidence in the business ability of his son, as he named him as one of the executors and one of the trustees. All the circumstances indicate that William Blair did not intend to create a spendthrift trust but only to protect the trust property from involuntary transfers.

Kales on Fu-ure Interests, para. 742, page 861, says:

"A mere trusteeship, even though it is for the protection of the beneficiaries, ought not, as a matter of taste, if for no other reason, to be called a 'spendthrift trust.' Only where there is added to the trusteeship express restraints on alienation is it justifiable to call the creation a spend-

thrift trust. Whether restraints on alienation, voluntary or involuntary, or both, are added ought to be determined by the application of the usual principles of construction to the language used. If the restraint is not expressed, no amount of extrinsic evidence or speculation and conjecture as to the testator's or settlor's inducement ought to be permitted to inject it into the will or settlement."

[fol. 84] In Ames v. Clark, 106 Mass. 573, the will contained a provision that no part of the bequest should be liable for the debts of the beneficiary; the beneficiary assigned his bequest to another; the validity of this assignment was questioned, but the court said: "The proviso that it should not be liable for his (the beneficiary's) debts while in the hands of the executor did not give the executor any authority to control his disposition of it nor deprive him of the right to dispose of it by his voluntary act."

From all these decisions we draw the conclusion that the Illinois courts view with disfavor restrictions on alienation; that while restrictions specifically expressed will be enforced, if the restraint is not expressed no speculation or conjecture should be permitted to inject it into the will.

It is obvious that decisions in other cases involving different language can give us only general rules. "Cases on wills may serve to guide us with respect to general rules in the construction of devises in wills, but unless a case cited be in every respect directly in point and agree in every circumstance with that in question, it will have little or no weight with the courts, who always look upon the intention of the testator as the polar star to direct them in the construction of wills." O'Hare v. Johnston, supra.

The words said to prohibit the assignments are, that the income should be paid to the testator's wife and to his son "directly upon their separate order and receipt therefor, for their sole and separate uses." There is force in the suggestion that the word "order" means something other than a payment into the hands of the testator's wife and son. The word "order" means a writing "requiring the party to whom it is addressed to deliver property of the person making the order to some one therein described." 3 Bouvier's Law Dictionary, Rawle's Third Revision, 2423. The trustees were required to pay the income to the life beneficiaries without any order from them. That mandate

was in the will itself. To pay the income to someone other than a beneficiary would require an order on the trustees signed by the beneficiary. The language of the will implies the very thing that has been done by the assignments.

It is important to note that the assignments to Mr. Blair's children were to the same persons who were, under the will, remaindermen, and who, in all probability, would receive the trust property on the death of their father. The effect of the assignments is merely to accelerate the gifts of the [fol. 85] grandfather, the testator, to his grandchildren. England v. England, 223 Ill. App. 549, and Tuttle v. Gunderson, 254 Ill. App. 352, involved cases where the will contained a clearly expressed restraint on voluntary alienation, but it was held in each case the testator did not intend to exclude from participating in the income the members of the family of the beneficiary.

If the testator had intended to restrict voluntary alienation by his son, this could have been readily accomplished by the use of a very few words. That he did not use such words is strong evidence that he did not so intend. Words, even of doubtful meaning, should not be so construed as to inject an intention into the will manifestly contrary to that of the testator.

For the reasons indicated, we held that the questioned assignments are valid, and the decree of the lower court is reversed and the cause remanded, with directions to enter a decree consistent with what is said in this opinion.

Reversed and remanded with directions.

Matchett, P. J., concurs.

O'Connor, J., dissents. (See next page.)

37406 Mr. Justice O'Connor Dissenting:

In Hopkinson v. Swain, 264 Ill., 11, the court said (p. 23): "There could be no such exemption from liability for debt if the beneficiary could convey or assign the income, for if she could do so it could also be seized in execution or attachment or reached by a creditor's bill."

In my opinion the Hopkinson case is not distinguishable from the case at bar and therefore the decree of the Superior court should be affirmed.

I, Sheldon W. Govier, Clerk of the Appellate Court, in and for the First District of the State of Illinois and keeper of the records, files and seal thereof, Do Hereby Certify

That the foregoing is a true copy of the opinion of the said Appellate Court in said cause, as appears of record in my office.

In Testimony Whereof, I have set my hand and affixed the seal of the said Appellate Court, at Chicago, this 4th day of April in the year of our Lord one thousand nine hundred and Thirty-four.

Sheldon W. Govier, Clerk of the Appellate Court of the First District, Illinois.

[fol. 86] Appellate Court, First District

Petitioner's Exhibit 16

U. S. Board of Tax Appeals

Docket 42313—63741

Admitted in Evidence May 2, 1934

At a Term of the Appellate Court, Begun and Held at Chicago, on Tuesday, the Sixth day of February, in the year of our Lord, one thousand nine hundred and Thirty-four, within and for the First District of the State of Illinois:

Present: The Honorable F. Matchett Presiding Justice. William H. McSurely Justice. John M. O'Connor Justice.

Sheldon W. Govier, Clerk. William D. Meyering, Sheriff.

No. 37406

Edward Tyler Blair and William McCormick Blair, as Trustees under the Last Will and Testament of William Blair, Deceased, Appellees,

vs.

Lucy Blair Linn, Edith Blair, Edward Seymour Blair, William McCormick Blair and Edward Tyler Blair, Appellants

Error to ——

Appeal From Cook Superior

Monday March 5, A. D. 1934.

On this day came again the said parties, and the Court having diligently examined and inspected, as well the record and proceedings aforesaid, as the matters and things therein assigned for Error, and being now sufficiently ad-

vised of and concerning the premises, are of the opinion that in the Record and proceedings aforesaid, and in the [fol. 87] rendition of the Decree aforesaid, there is Manifest Error: Therefore, it is considered by the Court that, for that Error, and others in the Record and proceedings aforesaid, the Decree of the Superior Court of Cook County, in this behalf, rendered, be reversed, annulled, set aside, and wholly for nothing esteemed, and that this cause be Remanded to the Superior Court of Cook County with directions to said Superior Court to enter a decree consistent with the views expressed in the opinion of this Court this day filed herein. And it is further considered by the Court that the said Appellants recover of and from the said Appellees their costs, by them in this behalf expended, to be taxed, and to be paid in due course of Administration of said Trusteeship. From which order and judgment Mr. Justice O'Connor Dissents.

I, Sheldon W. Govier, Clerk of the Appellate Court of the First District of the State of Illinois, Do Hereby Certify that the foregoing is a true copy of the final order of the said Appellate Court in the above entitled cause of record in my office.

In Testimony Whereof, I have set my hand and affixed the seal of the said Appellate Court, at Chicago, this 4th day of April in the year of our Lord one thousand nine hundred and Thirty-four.

Sheldon W. Govier, Clerk of the Appellate Court of the First District.

APPELLATE COURT, FIRST DISTRICT

——

vs.

——

Order Reversing and Remanding

Placita. —— ——, Attorney.

Superior Court of Cook County

(Decree)

UNITED STATES OF AMERICA,
State of Illinois,
County of Cook, ss:

Pleas, before the Honorable Denis E. Sullivan one of the Judges of the Superior Court of Cook County, in the State

[fol. 88] of Illinois, holding a branch Court of said Court, at a regular term of said Superior Court of Cook County, begun and holden at the Court House, in the City of Chicago, in said County, and State, on the first Monday, being the Fifth day of March, in the year of our Lord one thousand nine hundred and thirty Four, and of the Independence of the United States of America, the one hundred and fifty Eighth.

Present: The Honorable Denis E. Sullivan, Judge of the Superior Court of Cook County. Thomas J. Courtney, State's Attorney. William D. Meyering, Sheriff of Cook County.

Attest: Frank V. Zintak, Clerk.

Be it remembered that heretofore, to-wit: on the 31st day of March in the year of our Lord one thousand nine hundred and Thirty Four, the same being one of the days of the March Term of the Superior Court of Cook County the following among other proceedings were had in said Court and entered of record, to-wit:

Petitioner's Exhibit 17

In the Superior Court of Cook County

* * * (Caption) * * *

Decree

This cause came on to be heard on the bill of complaint of Edward Tyler Blair and William McCormick Blair as trustees under the last will and testament of William Blair, deceased, and on the answer thereto of Lucy Blair Linn, Edith Blair, Edward Seymour Blair and William McCormick Blair, individually.

And the court, taking all of the facts alleged in said bill of complaint and admitted by said answer to be true, and having heard the arguments of counsel and being fully advised in the premises now finds as follows:

1. Edward Tyler Blair, individually, was duly served with summons herein at least 20 days before the first Monday of January, 1934, and Lucy Blair Linn, Edith Blair, [fol. 89] Edward Seymour Blair and William McCormick Blair, individually, have entered their appearance herein and the court has jurisdiction of all the parties hereto.

2. Edward Tyler Blair, individually, has not entered any appearance and has not yet filed any exception, demurrer, plea or answer to the bill of complaint herein and was by order of this court entered September 20, 1933, duly defaulted and the cause taken as confessed against him.

3. The complainants, Edward Tyler Blair and William McCormick Blair, are the duly appointed and acting trustees under the last will and testament of William Blair who died a resident of Cook County, Illinois, on or about the 10th day of May, 1899. Said trustees are both residents of Cook County, Illinois, and the court has jurisdiction of the trust created by said will.

4. Said William Blair by his said will created a trust estate of which said Edward Tyler Blair is one of the beneficiaries and on the death of his mother on or about March 13, 1923, he became entitled to the whole of the net income for the remainder of his natural life.

5. On or about April 2, 1923, said Edward Tyler Blair, by instruments in writing assigned to said Lucy Blair Linn, Edith Blair and Edward Seymour Blair, three of his children, part of his life interest in said trust estate and by similar instruments in writing dated September 1, 1924, January 2, 1925, May 1, 1925, December 1, 1925, December 20, 1925, and January 2, 1926, he assigned additional parts of his life interest in said trust to said children and to William McCormick Blair, his other child. Notice of each of said assignments was duly given to the trustees, was accepted by them, and the proper part of the income was thereafter paid by the trustees from time to time directly to said children of Edward Tyler Blair.

6. Said trustees at that time believed that under the proper construction of the will of said William Blair, said Edward Tyler Blair could validly assign part of his interest in said trust estate to his said children.

7. On or about June 23, 1932, the United States Circuit Court of Appeals for the Seventh Circuit, in a case relating to the income tax of said Edward Tyler Blair, decided that his interest in said trust estate was not assignable and therefore said assignments were invalid.

8. Neither the trustees of said trust estate nor said assignees were parties to said case in the United States Cir-

cuit Court of Appeals for the Seventh Circuit and they were [fol. 90] not bound by said decision. Said decision raised a reasonable doubt in the mind of said trustees as to the proper distribution of the income of said trust estate as between said Edward Tyler Blair and his said assignees and they properly filed their bill of complaint herein praying this court to construe said will of William Blair as to the power of said Edward Tyler Blair voluntarily to convey and assign a part of his beneficial and equitable interest in said trust estate to his said children and as to the validity of said assignments to them.

9. This court has jurisdiction to construe said will as prayed in said bill of complaint and to determine the validity of said assignments and has jurisdiction of the subject matter hereof.

10. Paragraph Twenty of said will of William Blair provides:

"Twenty: I do hereby declare and direct that the income from said trust fund and estate which is herein ordered to be, from time to time as the same shall be received, paid to my said wife and to my said son and to his said wife and to their children and descendants of children in the cases aforesaid, shall be paid to them directly upon their separate order and receipt therefor, for their sole and separate use respectively, and that the same shall not be nor be made nor held in any manner nor by any proceedings whether in law or equity while yet in the hands of said trustees liable for or subject to the payment of any of the debts or obligations of either of the persons entitled to the same as above herein set forth."

11. Neither said Paragraph Twenty nor any other part of said will of William Blair, when properly construed, constitutes a restraint on the right of said Edward Tyler Blair to voluntarily assign his interest in said trust estate or any part thereof.

12. The assignments hereinbefore described are voluntary assignments of a part of the interest of said Edward Tyler Blair in said trust estate. Said assignments are valid.

The court being now fully advised in the premises, It is Ordered, Adjudged and Decreed by the Court:

First. Paragraph Twenty of the will of William Blair, when properly construed, is not a restraint on the right of said Edward Tyler Blair to voluntarily assign his interest in said trust estate or any part thereof.

Second. The assignments by Edward Tyler Blair to Lucy Blair Linn, dated April 2, 1923, September 1, 1924, and December 1, 1925, to Edith Blair dated April 2, 1923, Sep-
[fol. 91] tember 1, 1924, May 1, 1925, and December 20, 1925, to Edward Seymour Blair dated April 2, 1923, September 1, 1924, and January 2, 1925, and to William McCormick Blair dated January 2, 1925, and January 2, 1926, are all valid.

The court reserves jurisdiction of this cause and of the parties thereto for the purpose of determining the allowances to be made out of said trust estate to the several parties for their costs, disbursements and solicitors' fees in this proceeding.

Enter:

Denis E. Sullivan, *Judge.*

March 31, 1934.

STATE OF ILLINOIS,
County of Cook, ss:

I, Frank V. Zintak, Clerk of the Superior Court of Cook County, in and for the State of Illinois, and the keeper of the records, files and seals thereof, do hereby certify the above and foregoing to be a true, perfect and complete copy of a certain Decree made and entered of record in said court in a certain cause lately pending in said Court on the Chancery side thereof, wherein Edw. T. Blair & William Blair as Trustees etc. were complainants and Lucy Blair Linn, et al were defendants.

In Witness Whereof, I have hereunto set my hand, and affixed the seal of said Court, at Chicago, this 4th day of April A. D. 1934.

Frank V. Zintak, *Clerk.*

BEFORE UNITED STATES BOARD OF TAX APPEALS

Docket Nos. 42313, 63741. Promulgated January 31, 1935

EDWARD T. BLAIR, Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent

Findings of Fact and Opinion—Filed January 31, 1935.

1. In Commissioner v. Blair, 60 Fed. (2d) 340, the United States Circuit Court of Appeals for the Seventh Circuit reversed the decision of this Board in Edward T. Blair, 18 B. T. A. 69, a proceeding between the same parties as are involved in the instant proceedings but which involved the redetermination of the petitioner's income tax liability for the year 1923, and held that a certain trust created by the [fol. 92] will of the petitioner's father was a spendthrift trust and hence certain assignments made by the petitioner in 1923, of portions of the income to which he was entitled for life under the testamentary trust, were invalid under the law of Illinois and did not operate to relieve the petitioner of tax liability upon the amounts of income covered by the assignments. Subsequent to the decision of the United States Circuit Court of Appeals for the Seventh Circuit, the Appellate Court of Illinois, First District, a court of competent jurisdiction whose decision is binding upon the petitioner and his assignees, held, and pursuant to its holding the court of original jurisdiction of the state decreed, that the trust is not a spendthrift trust and that all the assignments made by the petitioner are valid. Held that in the instant proceedings, which involve the redetermination of the petitioner's tax liability for the years 1924, 1925, 1926, and 1929, the holding of the Appellate Court of Illinois and the resulting decree of the court of original jurisdiction that the trust in question is not a spendthrift trust and that all the assignments made by the petitioner are valid, are conclusive. Freuler v. Helvering, 29 U. S. 35. Held, further, that such assignments operated to transfer to the assignees the petitioner's right to receive income, and hence the petitioner is relieved of liability to pay tax upon the income received by the assignees under the assignments. Edward T. Blair, supra.

2. Held that, in computing the net income of the trust distributable to the petitioner, amounts expended by the trustees as commissions and legal fees in leasing certain properties belonging to the trust are not deductible in their entirety in the years in which expended, but are deductible pro rata over the terms of the leases.

C. F. Selfridge, Esq., and J. F. Dammann, Esq., for the petitioner.

Bruce A. Low, Esq., for the respondent.

These are proceedings, duly consolidated for hearing and opinion, for the redetermination of deficiencies in income taxes as follows:

Docket No.	Year involved	Deficiency
42313	1924	$7,642.52
42313	1925	10,399.94
42313	1926	12,876.36
63741	1929	14,533.58

[fol. 93] In Docket No. 42313 it is alleged that the respondent erred (1) in including in the income of the petitioner in the years 1924, 1925, and 1926 the respective amounts of $30,000, $65,356.89, and $58,434.96, which, it is alleged, were never received by petitioner or credited to him, but were in fact income of the trust estate created under the will of William Blair, father of this petitioner, which income was properly distributed by the trustees of the estate of William Blair to Edith Blair, Edward Seymour Blair, Lucy Blair Linn, and William McCormick Blair; and (2) in increasing the petitioner's income in the amount of $16,856.89 as a result of the disallowance of deductions by the trustees of the estate of Edward T. Blair [William Blair] for commissions and legal expenses paid in connection with two leases on real estate which constituted a part of the assets of the estate.

In Docket No. 63741 it is alleged that the respondent erred (1) in including as additional income of the petitioner from the William Blair trust the sum of $57,000 which was paid in 1929 by the trustees of the trust to children of the petitioner pursuant to assignments to such children of part of the petitioner's interest in the trust estate; (2) in increasing the net income of the William Blair trust and increasing the income of the petitioner as the life bene-

ficiary of such trust in the amount of $14,541.34 on account of the disallowance of certain deductions claimed as necessary expense in the operation of a certain building belonging to the trust located at 608 South Wabash Avenue, Chicago, Illinois, such expenditures being $5,580 paid as commission on April 30, 1929, to a real estate broker for services in connection with the consummation of a 10-year lease on the premises, and $10,000 paid for expenditures for repairing such building, a total of $15,580, of which the respondent allowed only $1,038.66, being the portion allocable to the eight months of the year 1929 during which the tenant occupied the premises; and (3) in not allowing the petitioner a deduction of an amount of $762.57, being a part of the sum of $17,619.46 paid out by the trustees in 1925 as commissions to real estate brokers for leases on trust property and legal fees in connection therewith, which amount was claimed by the trustees as a deduction on their return for the year 1925, the respondent holding that the amount should be spread over the period of the lease. This assignment of error is in the alternative; that is, in the event that the respondent's holding that the amount of $17,619.46 [fol. 94] should be spread over the period of the lease is sustained by the Board in Docket No. 42313.

These proceedings were submitted upon a stipulation of facts and certain exhibits, all of which we incorporate herein by reference.

Findings of Fact

The petitioner is a resident of Chicago, Illinois. His father, William Blair, was also a resident of Chicago, Illinois. The latter died May 10, 1899, leaving a last will and testament which was duly admitted to probate in the Probate Court of Cook County, Illinois. Such will provided, *inter alia,* for the transfer of all the deceased's real estate subject to a life estate of his wife in the homestead, and also all stocks and bonds of the deceased to the deceased's nephew, Chauncy J. Blair, and the deceased's son, Edward Tyler Blair (the petitioner herein) in trust. It was provided that the trustees should keep the property in good condition and pay all charges against it. The trustees were directed to pay the deceased's wife one half of the net income from the trust property as it arose or accrued during her lifetime, and to pay the other half to the petitioner

during his lifetime. It was provided that upon the death of the wife of the deceased the petitioner should receive the whole of the net income from the trust property as it arose or accrued during his lifetime. It was further provided that after the death of the petitioner the net income should be paid to the wife of the deceased or to the daughter-in-law of the deceased (wife of the petitioner) or the surviving children, under certain circumstances, until the youngest child of the petitioner reached the age of 21 years, whereupon the trustees were to transfer the trust property to such children of the petitioner. The will contained the following provision:

Twenty. I do hereby declare and direct that the income from said trust fund and estate which is herein ordered to be, from time to time as the same shall be received paid to my said wife and to my said son and to his said wife and to their children and descendants of children in the case aforesaid shall be paid to them directly upon their separate order and receipt therefor, for their sole and separate use respectively, and that the same shall not be nor be made nor held in any manner nor by any proceedings whether in [fol. 95] law or equity while yet in the hands of said trustees liable for or subject to the payment of any of the debts or obligations of either of the persons entitled to the same as above herein set forth.

The wife of the deceased died on or about March 13, 1923.

On or about April 2, 1923, the petitioner made, executed, and delivered a certain indenture in which he is the party of the first part and Lucy Blair Linn, his daughter, is the party of the second part. Such indenture provided as follows:

That the said party of the first part, in consideration of love and affection and One Dollar ($1) in hand paid by the party of the second part, the receipt whereof is hereby acknowledged, does hereby sell, assign, transfer and set over unto said party of the second part an interest amounting to Six Thousand Dollars ($6,000) for the remainder of the current calendar year, and Nine Thousand Dollars ($9,000) in each calendar year thereafter in the net income which the said party of the first part now is, or may hereafter be, entitled to receive during his life from the Trustees

under the Will of William Blair, deceased, late of the said City of Chicago; and the said party of the first part hereby authorizes and empowers said party of the second part, either in her own name or in the name of the said party of the first part, to receive and receipt to the Trustees under the Will of William Blair, deceased, for Six Thousand Dollars ($6,000) for the remainder of the current calendar year and for Nine Thousand Dollars ($9,000) in each year thereafter of the income and moneys which shall at any time become payable to said party of the first part under or by virtue of the terms and provisions of the said Will of William Blair deceased.

All payments hereunder shall be made in person to said party of the second part and not upon any written or verbal order nor upon any assignment, nor upon any transfer by operation of law, and shall cease upon the death of either party hereto.

On or about April 2, 1923, the petitioner made, executed, and delivered another indenture, in which he is the party of the first part and Edith Blair, his daughter, is the party of the second part. Such indenture is in all material respects identical with the above quoted indenture except that [fol. 96] the interest transferred amounted to $9,000 in each and every calendar year.

On or about April 2, 1923, the petitioner made, executed, and delivered a certain indenture in which he is the party of the first part and Edward Seymour Blair, his son, is the party of the second part. Such indenture is identical with that between the petitioner and Edith Blair.

On September 1, 1924, by an indenture entered into between the petitioner and Lucy Blair Linn, his daughter, the petitioner in consideration of love and affection and one dollar, sold, assigned, transferred, and set over to Lucy Blair Linn "an interest amounting to Two Hundred Fifty Dollars ($250) in each month in addition to the assignment made under date of April 2, 1923, in the net income which the said party of the first part, petitioner, now is or may hereafter be, entitled to receive during his life from the Trustees under the Will of William Blair, Deceased." Therein the petitioner empowered Lucy Blair Linn to receive and receipt to the trustees for the money in her own name or in his name. This indenture also provided that

payments should cease upon the death of either of the parties thereto.

On December 1, 1925, the petitioner and Lucy Blair Linn entered into another indenture similar in all material respects to the one executed between them on September 1, 1924, whereby the petitioner transferred to her an interest amounting to $500 per month in addition to the assignments already made, in the net income which the petitioner was entitled to receive during his life from the trustees under the will of William Blair, deceased.

By indentures similar in all respects to those entered into between the petitioner and Lucy Blair Linn, the petitioner on each of the dates of September 1, 1924, and May 1, 1925, transferred to Edith Blair, an interest of $250 per month, in addition to the assignments already made, in the net income which the petitioner was entitled to receive during his life from the trustees under the will of William Blair, deceased.

By indentures, otherwise similar to corresponding indentures referred to just above, the petitioner on September 1, 1924, and January 2, 1925, transferred to Edward Seymour Blair interests in the respective amounts of $250 per month and $500 per month, in addition to the assignments already made, in the net income which he was entitled to receive under the will of William Blair, deceased. [fol. 97] By indentures entered into between the petitioner and William McCormick Blair, his son, under dates of January 2, 1925, and January 2, 1926, which indentures are otherwise similar to the indenture entered into between the petitioner and Lucy Blair Linn on September 2, 1923, the petitioner transferred to William McCormick Blair the respective interests of $4,000 and $2,000 in each calendar year in the net income which petitioner was entitled to receive during his life from the trustees under the will of William Blair, deceased.

The petitioner and his son, William McCormick Blair, were during the years 1923 and 1929, inclusive, and still are, the duly authorized and acting trustees of the trust created by the will of William Blair.

On the respective dates of each of the indentures referred to above the petitioner notified the trustees in writing of the assignments contained therein and directed the trustees to make payment directly to the assignees. The trustees

accepted such assignments and noted their acceptance on the face of such notices.

During the years 1924, 1925, 1926, and 1929 the trustees of the William Blair trust distributed directly to Lucy Blair Linn, Edith Blair, Edward Seymour Blair, and William McCormick Blair the following amounts out of the income of the William Blair trust:

	1924	1925	1926	1929
Lucy Blair Linn	$10,000	$12,500	$18,000	$18,000
Edith Blair	10,000	14,000	15,000	15,000
Edward Seymour Blair	10,000	18,000	18,000	18,000
Wm. McCormick Blair		4,000	6,000	6,000

Lucy Blair Linn, Edith Blair, Edward Seymour Blair, and William McCormick Blair each filed income tax returns for each of such years in which they reported the amounts thus distributed to them by the trustees of the William Blair trust, and each paid to the collector of internal revenue in Chicago the taxes due thereon. Since the ruling of the respondent referred to hereinafter they have filed claims for the refund of the taxes on such income. No refunds will be made before these cases are finally determined.

The respondent, in auditing the fiduciary returns of the trustees of the William Blair trust and in auditing the returns of Edward T. Blair (petitioner), Lucy Blair Linn, Edith Blair, Edward Seymour Blair, and William McCormick Blair, adjusted such returns to show that all of [fol. 98] the net income of such trust was distributed or distributable to the petitioner, and the respondent has ruled that the petitioner should pay an income tax on all of such income and that no tax was due from Lucy Blair Linn, Edith Blair, Edward Seymour Blair, and William McCormick Blair on account of the part of the trust income distributed to them.

On or about March 24, 1933, the trustees of the William Blair trust filed a bill of complaint in the Superior Court of Cook County, Illinois, in Chancery, General Number 576471, praying that the court construe the will of William Blair and advise the trustees whether the assignments from the petitioner to Lucy Blair Linn, Edith Blair, Edward Seymour Blair, and William McCormick Blair were valid and advise the trustees whether they should pay to

the assignees part of the net income of the trust estate pursuant to the assignments. The defendants in this proceeding were Lucy Blair Linn, Edith Blair, Edward Seymour Blair, William McCormick Blair, and Edward Tyler Blair (petitioner), individually.

In such bill of complaint it was recited that the Commissioner of Internal Revenue, in auditing the reports of the trustees and the income tax returns of Edward Tyler Blair (petitioner), ruled that all of the income of the trust was distributable to Edward Tyler Blair notwithstanding the assignments and that Edward Tyler Blair should have paid an income tax on the full amount of the income of the trust; that Edward Tyler Blair appealed to the United States Board of Tax Appeals, which reversed the ruling of the Commissioner; that the United States Circuit Court of Appeals for the Seventh Circuit reversed the United States Board of Tax Appeals and held that the interest of Edward Tyler Blair under the will of William Blair could not be assigned in whole or in part by Edward Tyler Blair, since the trust was a spendthrift trust, and therefore all the income of the trust was distributable to Edward Tyler Blair notwithstanding the assignments; that a writ of certiorari to review such decision of the United States Circuit Court of Appeals for the Seventh Circuit was denied by the Supreme Court of the United States; that the trustees were then advised by counsel that the decision of the United States Circuit Court of Appeals raised a serious doubt as to the validity of the assignments and that such trustees might be personally liable if they distributed the income of the trust to persons other than Edward Tyler Blair; that the assignees under the assignments in question contended [fol. 99] that neither the trustees nor themselves nor any of them was a party to the proceeding before the United States Circuit Court of Appeals for the Seventh Circuit and that they are not bound by its decision; and that the trustees were informed and believed that if they followed the decision of the United States Circuit Court of Appeals for the Seventh Circuit and refused to distribute to the assignees they would be subjected to a multiplicity of suits by such assignees.

The Superior Court of Cook County held that all the assignments in question were invalid. Thereafter an appeal was taken to the Appellate Court of Illinois, First District,

and the decision of the Superior Court was reversed. In its opinion the Appellate Court stated in part:

As a general proposition, restraints on alienation are looked upon with disfavor by the Illinois courts. Davis v. Hutchinson, 282 Ill. 523; Merchants Loan & Trust Co. v. Patterson, 308 Ill. 519. * * *

* * * * * * *

While our Supreme Court has decided that restraints on the rights of creditors will be given effect, and also, that an expressed restraint on alienation will be enforced, in no case has it been held that an implied restraint will be enforced.

* * * * * * *

William Blair had complete confidence in the business ability of his son, as he named him as one of the executors and one of the trustees. All the circumstances indicate that William Blair did not intend to create a spendthrift trust but only to protect the trust property from involuntary transfers.

* * * * * * *

The words said to prohibit the assignments are, that the income should be paid to the testator's wife and to his son "directly upon their separate order and receipt therefor, for their sole and separate uses." There is force in the suggestion that the word "order" means something other than a payment into the hands of the testator's wife and son. The word "order" means a writing "requiring the party to whom it is addressed to deliver property of the person making the order to some one therein described." 3 Bouvier's Law Dictionary, Rawle's Third Revision, 2423. The trustees were required to pay the income to the life beneficiaries without any order from them. That [fol. 100] mandate was in the will itself. To pay the income to someone other than a beneficiary would require an order on the trustees signed by the beneficiary. The language of the will implies the very thing that has been done by the assignments.

* * * * * * *

If the testator had intended to restrict voluntary alienation by his son, this could have been readily accomplished by the use of a very few words. That he did not use such

words is strong evidence that he did not so intend. * * *

For the reasons indicated, we hold that the questioned assignments are valid, and the decree of the lower court is reversed and the cause remanded, with directions to enter a decree consistent with what is said in this opinion.

After the cause was remanded to the Superior Court of Cook County, such Superior Court entered its decree on March 31, 1934, which provided in part as follows:

First. Paragraph Twenty of the will of William Blair, when properly construed, is not a restraint on the right of said Edward Tyler Blair to voluntarily assign his interest in said trust estate or any part thereof.

Second. The assignments by Edward Tyler Blair to Lucy Blair Linn, dated April 2, 1923, September 1, 1924 and December 1, 1925, to Edith Blair dated April 2, 1923, September 1, 1924, May 1, 1925 and December 20, 1925, to Edward Seymour Blair dated April 2, 1923, September 1, 1924, and January 2, 1925, and to William McCormick Blair dated January 2, 1925 and January 2, 1926, are all valid.

In their brief before the Appellate Court of Illinois the assignees, who were the appellants in that court, took the position that the assignments were valid. Before such court the trustees, who were the appellees, took the position that the trust was a spendthrift trust and that the assignments were invalid, relying among other authorities, upon the decision of the United States Circuit Court of Appeals for the Seventh Circuit, heretofore mentioned, which is Commissioner v. Blair, 60 Fed. (2d) 340.

During the year 1925 the William Blair trust owned five pieces of real estate in or about Chicago, Illinois, including those located at 180 West Randolph Street, 729 South Wabash Avenue, and 608 South Michigan Avenue. The trust still owns these five pieces of real estate in Chicago.

During the year 1925 the trustees of the trust leased the piece of real estate located at 180 West Randolph Street for [fol. 101] a term of 25 years. Incident to the making of this lease they paid $11,640 as a commission to a real estate broker and $200 for legal services.

During the year 1925 the trustees also executed and delivered a lease for a term of 20 years on the property at 729 South Wabash Avenue. Incident to the making of this lease they paid $5,479.46 as a commission to a real estate broker and $300 for legal services.

In the year 1929 the trustees executed and delivered a lease for a period of 10 years on the property at 608 South Michigan Avenue. Incident to the making of such lease they paid $5,580 as a commission to a real estate broker.

Prior to the execution of the lease in 1929, the property at 608 South Michigan Avenue had been vacant for several months and was in need of extensive repairs. The lessors agreed that in lieu of making repairs on the premises they would allow the lessee an aggregate amount of $10,000 for repairs, improvements, and additions to the premises on the condition that not less than that amount should be expended, exclusive of trade fixtures and fittings. During 1929 the trustees paid such $10,000 to the contractor employed to do the work. The parties to the instant proceeding have stipulated that $5,000 thereof was for improvements to the building having a probable useful life equal to the term of the 10-year lease and $5,000 was payment for ordinary repairs to the building. They further stipulated that $5,000 thereof is deductible in 1929 and the other $5,000 should be spread over the remaining period of the lease.

The trustees of the William Blair trust charged the commissions and legal fees incurred in connection with the three leases and the $10,000 paid to the contractor for the work at 608 South Michigan Avenue against the income of the trust, so that the net income to be distributed to the petitioner was actually reduced by the amount of these expenditures.

In the deficiency notice for the year 1929 the respondent sustained the revenue agent in his determination of the amount of income of the trust estate of William Blair. The revenue agent's report contains the following:

On April 30, 1929 a ten year lease was negotiated and a commission of $5,580.00 paid. $10,000 was paid by the Estate to the tenant, Irwin & Company for expenditures made by them for new elevators and other changes required by them. * * * $1,038.66 or 1/10 of $15,580. for 8 months has been allowed in this report.

[fol. 102] OPINION

McMAHON:

The principal question presented is whether the amounts of $30,000, $48,500, $57,000, and $57,000 paid by the trustees of the William Blair trust to the four children of the peti-

tioner in the respective years 1924, 1925, 1926, and 1929, under the assignments referred to in our findings of fact, constituted taxable income to the petitioner in those years. The respondent held that the full amount of the net income of the trust was taxable to the petitioner in each year, since, under the terms of the will of William Blair, the petitioner's father, the petitioner was entitled to the same as it arose or accrued. It is the position of the respondent that the assignments do not relieve petitioner of his liability for the tax.

In Edward T. Blair, 18 B. T. A. 69, we were concerned with the tax liability of the same petitioner as is here involved for the year 1923 and had under consideration the three assignments made by the petitioner on April 2, 1923, to Lucy Blair Linn, Edith Blair, and Edward Seymour Blair. We there held that such assignments were valid and effected conveyances of the petitioner's interest in the trust to the extent indicated in each assignment and that the income accruing to such portion assigned was not taxable to the petitioner.

In Commissioner v. Blair, 60 Fed. (2d) 340; certiorari denied, 288 U. S. 602, the United States Circuit Court of Appeals for the Seventh Circuit reversed the decision of this Board in Edward T. Blair, supra, its holding being based upon its conclusion that under the law of Illinois the testamentary trust in question was a spendthrift trust and hence the petitioner could not make a valid assignment of his interest in the income from the trust prior to the time it was received by him. The Circuit Court there stated in part:

> The only question presented for our determination is whether the law will permit the trust income devised to respondent by his father's will to be assigned by him prior to his actual receipt of it. *If this question be answered in the affirmative, the ruling of the Board is correct;* if it be answered in the negative, respondent is properly chargeable with the taxes assessed, and the cause must be reversed.

[1] The citizenship of respondent and testator, the location of the trust property, and *the creation and administration of the trust all being in Illinois, we are required to be* [fol. 103] *guided by the laws of that state in determining the*

question presented. Spindle, Assignee, v. Shreve, 111 U. S. 542, 4 S. Ct. 522, 28 L. Ed. 512.

* * * * * * *

* * * *However, we are concerned only with the law as the Illinois courts have interpreted it, and whether that interpretation be right or wrong is beside the question.* [Emphasis supplied.]

At the time the Circuit Court of Appeals rendered its opinion quoted above the courts of Illinois had not, so far as we know, construed the will of the petitioner's father or passed upon the validity of the particular assignments in question. However, subsequent thereto, the Appellate Court of Illinois, First District, held that the testamentary trust was not a spendthrift trust and further held that all the assignments made by the petitioner were valid.

A somewhat similar situation was presented in Hubbell v. Helvering, 70 Fed. (2d) 668, decided by the United States Circuit Court of Appeals for the Eighth Circuit. There the question presented was whether amounts retained by trustees from the gross receipts of a trust estate for the years 1924, 1925, 1926, and 1928 to maintain a reserve for depreciation of trust assets and to offset the undepreciated cost of obsolete buildings constituted distributable and taxable income to the beneficiaries of the trust. That court, in a prior proceeding, involving the same question and taxpayer for the years 1922 and 1923, had held that the trust instrument did not require or provide for such depreciation and obsolescence charges and that the amounts set aside therefor were distributable and taxable to the beneficiaries. Hubbell v. Burnet, 46 Fed. (2d) 446, affirming F. C. Hubbell, 14 B. T. A. 1040; certiorari denied, 283 U. S. 840. However, after such prior decision of the Circuit Court of Appeals for the Eighth Circuit, a court of competent original jurisdiction of the State of Iowa, the District Court of Polk County, announced a contrary construction of the trust, and thereafter the Eighth Circuit held that despite its own prior decision it was required, under the decision of the Supreme Court in Freuler v. Helvering, infra, to follow the holding of the state court. The Circuit Court of Appeals for the Eighth Circuit stated in part:

If it were open to us in this case to construe this trust agreement, we would see no reason to change the views

and conclusions stated in the earlier case. Petitioner con-
[fol. 104] tends that we have no such freedom, but are bound to accept a contrary construction announced by the District Court of the state of Iowa in and for Polk County, entered July 10, 1931 (since our opinion in the above case). We think this contention ruled in favor of petitioner by the above case of John Freuler, Adm., v. Guy T. Helvering, Commissioner, decided by the Supreme Court, since submission of this case. In respondent's brief in this case is the statement: "This identical question is now before the Supreme Court in John Freuler, Administrator of the Estate of Louise P. V. Whitcome, v. Guy T. Helvering, * * *" We are not able to distinguish the two cases.

In Hubbell v. Helvering, supra, the Circuit Court of Appeals for the Eighth Circuit reversed the decision of the Board in F. C. Hubbell, 27 B. T. A. 814, upon this very issue. The Board's decision was based upon the case of Commissioner v. Freuler, 62 Fed. (2d) 733, which was reversed by the Supreme Court in Freuler v. Helvering, infra, prior to this decision of the Circuit Court of Appeals for the Eighth Circuit.

In Freuler v. Helvering, 291 U. S. 35, the Supreme Court held that, in determining the amount of the income taxable to beneficiaries of a trust under the provisions of section 219 of the Revenue Act of 1921, the decision of a court of the State of California having jurisdiction of the trust in an action brought by the trustee for approval of his account is binding. While the Supreme Court held that the holding of the California court constituted an "order governing the distribution" of the income within the meaning of section 219 of the Revenue Act of 1921, it also held that it constituted an adjudication of the property rights of the beneficiaries which must be considered in determining the Federal income tax liability of the beneficiaries. The Supreme Court stated in part:

Moreover, the decision of that court, until reversed or overruled, establishes the law of California respecting distribution of the trust estate. It is none the less a declaration of the law of the state because not based on a statute, or earlier decisions. The rights of the beneficiaries are property rights and the court has adjudicated them. What the law as announced by that court adjudges distributable

is, we think, to be so considered in applying section 219 of the Revenue Act of 1921.

[fol. 105] It is well settled that the decision of a state court of competent jurisdiction upon property rights, as between the parties to the proceeding in the state court, is conclusive upon the Federal courts until it is reversed or overruled, Freuler v. Helvering, supra; Utterhart v. United States, 240 U. S. 598; Hubbell v. Helvering, supra; and Commissioner v. Field, 42 Fed. (2d) 820, affirming Marshall Field, 15 B. T. A. 718, and in accordance with the above authorities, which are here closely in point, we hold that the decree of the Superior Court of Cook County, Illinois, entered pursuant to the decision of the Appellate Court of Illinois, First District, adjudicating that the testamentary trust in question herein is not a spend-thrift trust and that the assignments in question are valid, is binding upon us.

As in the case of Freuler v. Helvering, supra, there is no showing in the instant proceeding that the proceedings in the state courts were collusive or that the decision or decree of the state courts was entered by consent.

Our holding is not inconsistent with the holding of the Seventh Circuit in Commissioner v. Blair, supra, for the reason, as stated above, that the situation is different here, there having been a subsequent decision of the Appellate Court of Illinois construing the subject matter involved. Hubbell v. Helvering, supra.

Our attention has been called to the following provision of the statutes of Illinois:

> Opinions. Sec. 17. All opinions or decisions of said court [Appellate Court] upon the final hearing of any cause, shall be reduced to writing by the court, briefly giving therein the reasons for such opinion or decision, and be filed in the cause in which rendered: *Provided*, that such opinion shall not be of binding authority in any cause or proceeding, *other than in that in which they may be filed.* (Cahill's Revised Statutes of Illinois, 1933, Ch. 37, ¶ 49.) [Emphasis supplied.]

As we interpret this statute it means that any opinion or decision of an Appellate Court in Illinois shall not be binding as a precedent in any other proceeding, but it does not mean that it shall not be binding upon the parties to the

particular proceedings. It expressly contemplates that such opinion or decision shall be binding on such parties. See Chapman v. Northern Trust Co., 296 Ill. 253; 129 N. E. 836, decided February 15, 1926. This Illinois statute has been in effect since as early as 1885.

[fol. 106] In passing, we observe that, under the decision of the Illinois Appellate Court and resultant decree of the Superior Court, the petitioner can never recover the amounts paid under the assignment in question and the trustees must continue to pay the assignees; and, as will be hereinafter pointed out, the amounts paid were never income to the petitioner.

We have not overlooked the decision of the District Court for the Eastern District of Illinois in Hall v. Main, 34 Fed. (2d) 528, wherein it was stated by way of dictum that since the statutes of Illinois provide that the decisions of the Appellate Court shall not be accepted as binding precedents they can not be accepted by the Federal courts as determinative of the law of the state. Hall v. Main, supra, grew out of a bankruptcy proceedings and it was properly held by the United States District Court that the decision of an Appellate Court of Illinois with respect to the sale of some of the assets of the bankrupt was not binding upon the bankruptcy court since the trustee in bankruptcy was not a party to that proceeding. Hall v. Main, supra, was affirmed by the United States Circuit Court of Appeals for the Seventh Circuit in Main v. Hall, 41 Fed. (2d) 715, and such was the reason given by the Circuit Court for holding that the Illinois Appellate Court decision did not affect the determination of the bankruptcy court. The Circuit Court pointed out that the bankruptcy court had jurisdiction to pass on the question decided by the Appellate Court. It may be added that the Board's jurisdiction is limited here to redetermining the correct deficiency in tax and does not embrace the authority to try or decide upon the title to property. This case is clearly distinguishable from the instant proceedings.

We turn then to a consideration of the question of whether the petitioner, by the assignments in question, assigned future income or a present interest in property. This question was not passed upon by the Seventh Circuit in Commissioner v. Blair, supra. The court there specifically stated:

Inasmuch as we hold that respondent had no power to alienate the property in controversy, it becomes unnecessary to decide whether the income attempted to be alienated is future income or a present interest in property.

In Edward T. Blair, supra, we held that the petitioner, by virtue of the three original assignments involved herein, assigned portions of his trust estate and held that the petitioner was not taxable upon the income accruing there- [fol. 107] after to the assignees. The remainder of the assignments involved in the instant proceedings are either merely supplemental to or substantially the same as those three. The Board has thus passed upon this very phase of the question involved in the instant proceedings and we adhere to our holding therein that the assignments relieved the petitioner of tax liability upon the income accruing to the assignees under all of the assignments. As pointed out the Circuit Court of Appeals for the Seventh Circuit in Commissioner v. Blair, supra, did not pass upon or reverse the Board on this phase of the question which was involved in Edward T. Blair, supra; it expressly left it open. The instant proceedings, in so far as this phase of our question is concerned, are quite similar to Marshall Field, supra, followed by the Board in Edward T. Blair, supra, and affirmed by the United States Circuit Court of Appeals for the Second Circuit in Commissioner v. Field, supra. The following cases, involving circumstances more or less similar, also sustain our conclusion herein in this respect. Eugene Siegel, Executor, 20 B. T. A. 563; petition to review dismissed by the United States Circuit Court of Appeals for the Sixth Circuit on October 6, 1931; Copeland v. Commissioner, 41 Fed. (2d) 501; Rosenwald v. Commissioner, 33 Fed. (2d) 423; certiorari denied, 280 U. S. 599; Shellabarger v. Commissioner, 38 Fed. (2d) 566; Nelson v. Ferguson, 50 Fed. (2d) 121; certiorari denied, 28[illegible] U. S. 565; and Hall v. Burnet, 54 Fed. (2d) 443; certiorari denied, 285 U. S. 552.

It is contended by the petitioner that the respondent erred in computing the 1925 income of the trust distributable to the petitioner in not allowing to the trust a deduction in the amount of $17,619.46, being the total of the amounts paid in 1925 as commissions and legal fees in leasing certain properties belonging to the trust. It is alleged in the petition that the respondent allowed only $762.57 of this as

a deduction in the year 1925. This action of the respondent was correct. It is well settled that such expenditures are capital expenditures, which are not deductible in their entirety in the year in which paid out but are deductible pro rata over the term of the lease. Roby Realty Co., 19 B. T. A. 696; petition to review dismissed by the Eighth Circuit, 62 Fed. (2d) 1079; 950 Park Avenue Corporation, 20 B. T. A. 288; Mary C. Young, 20 B. T. A. 692; affd., Young v. Commissioner, 60 Fed. (2d) 715; certiorari denied, 287 U. S. 652; and Bonwit Teller & Co., 17 B. T. A. 1019; affd., [fol. 108] Bonwit Teller & Co. v. Commissioner, 53 Fed. (2d) 381; certiorari denied, 284 U. S. 690. The petitioner does not allege that the respondent failed to allow the proper deduction in this respect in the year 1926. The respondent's determination in these respects as to the years 1925 and 1926 is approved. The petitioner does allege, however, that the respondent erred in failing to allow as a deduction from the amount distributable to him in 1929 from the trust an amount of $762.57, being a part of the sum of $17,619.46 paid out by the trustees in 1925 as commissions and legal fees incident to the execution of the leases. From the record we can not determine that the respondent did not allow a proper deduction as to this in 1929. However, if such a proper deduction has not been allowed, adjustment will be made under Rule 50.

In computing the net income distributable to the petitioner from the trust in 1929 the respondent allowed as a deduction only a pro rata portion of the amount of $5,580 which was paid in that year as commissions to a real estate broker for the execution of a lease on property belonging to the trust. This the petitioner alleges was error. However, for the reason stated above, we sustain this holding of the respondent.

The parties have stipulated that of the amount of $10,000 paid by the trustees in 1929 upon the property at 608 South Michigan Avenue, the amount of $5,000 was for improvements to the building having a probable useful life equal to the term of the 10-year lease, that such amount should be spread over the remaining period of the lease, and that the remaining $5,000 was payment for ordinary repairs to

the building, which amount is deductible in 1929. Adjustment will be made accordingly under Rule 50.

Reviewed by the Board.

Decision will be entered under Rule 50.

SEAWELL dissents.

BEFORE UNITED STATES BOARD OF TAX APPEALS

* * * (Caption—No. 42313) * * *

DECISION—Entered March 22, 1935

Pursuant to the finding of fact and opinion of the Board promulgated on January 31, 1935, the respondent herein having on March 1, 1935, filed a notice of settlement and proposed recomputation and the petitioner having on March 19, 1935, filed an acquiesence in the computation as made [fol. 109] by the respondent, now therefore, it is

Order and Decided: That there is no deficiency in income tax for the year 1924, and for the years 1925 and 1926, there are deficiencies in income tax in the respective amounts of $1,775.70 and $258.30.

(S.) Stephen J. McMahon, Member. (Seal.)

Entered March 22, 1935.

BEFORE UNITED STATES BOARD OF TAX APPEALS

* * * (Caption—No. 63741) * * *

DECISION—Entered March 25, 1935

Pursuant to the findings of fact and opinion of the Board promulgated January 31, 1935, the respondent herein having on March 1, 1935, filed a notice of settlement and recomputation and the petitioner having on March 19, 1935, filed an acquiesence in the computation as made by the respondent, now therefore, it is

Ordered and Decided: That there is a deficiency in income tax for the year 1929 in the amount of $1,887.70.

(S.) Stephen J. McMahon, Member. (Seal.)

Entered March 25, 1935.

IN UNITED STATES CIRCUIT COURT OF APPEALS

* * * (Caption) * * *

PETITION FOR REVIEW AND ASSIGNMENTS OF ERROR—Filed June 12, 1935

To the Honorable Judges of the United United States Circuit Court of Appeals for the Seventh Circuit:

Now comes Guy T. Helvering, Commissioner of Internal Revenue, by his attorneys, Frank J. Wideman, Assistant Attorney General, Robert H. Jackson, Assistant General [fol. 110] Counsel for the Bureal of Internal Revenue, and Bruce A. Low, Special Attorney, Bureau of Internal Revenue, and respectfuly shows:

I

That the petitioner on review is the duly appointed, qualified, and acting Commissioner of Internal Revenue of the United States, holding his office by virtue of the laws of the United States. That the respondent on review, Edward T. Blair, is an individual residing at 1516 Lake Shore Drive, Chicago, Illinois, and filed his income tax returns for the years 1924, 1925, 1926 and 1929 with the Collector of Internal Revenue for the First District of Illinois; that the Collector of Internal Revenue for the First District of Illinois has his office within the jurisdiction of the United States Circuit Court of Appeals for the Seventh Circuit; that the Court in which the review of this proceeding is sought is the United States Circuit Court or Appeals for the Seventh Circuit.

II

The nature of the controversy is as follows:

The taxpayer is an individual residing in the State of Illinois. Under the express terms of the duly probated will of his deceased father, he became the sole beneficiary of a certain trust created by his father after the death of his wife. His wife died on March 13, 1923. The will of his deceased father was in part as follows:

"Twenty. I do hereby declare and direct that the income from said trust fund and estate which is herein ordered to

be, from time to time as the same shall be received paid to my said wife and to my said son and to his said wife and to their children and descendants of children in the cases aforesaid shall be paid to them directly upon their separate order and receipt therefor, for their sole and separate use respectively, and that the same shall not be nor be made nor held in any manner nor by any proceedings whether in law or equity while yet in the hands of said trustees liable for or subject to the payment of any of the debts or obligations of either of the persons entitled to the same as above herein set forth."

On or about April 2, 1923, the taxpayer, as party of the first part, executed and delivered three indentures to his three children, Lucy Blair Linn, Edith Blair, and Edward [fol. 111] Seymour Blair, as parties of the second part. Each of the three original indentures provided (except as to name and amount) in part as follows:

"That the said party of the first part, in consideration of love and affection and One Dollar ($1) in hand paid by the party of the second part, the receipt whereof is hereby acknowledged, does hereby sell, assign, transfer and set over unto said party of the second part an interest amounting to Six Thousand Dollars ($6,000) for the remainder of the current calendar year, and Nine Thousand Dollars ($9,000) in each calendar year thereafter in the net income which the said party of the first part now is, or may hereafter be, entitled to receive during his life from the Trustees under the Will of William Blair, deceased, late of the said City of Chicago; and the said party of the first part hereby authorizes and empowers said party of the second part, either in her own name or in the name of the said party of the first part, to receive and receipt to the Trustees under the Will of William Blair, deceased, for Six Thousand Dollars ($6,000) for the remainder of the current calendar year and for Nine Thousand Dollars ($9,000) in each year thereafter of the income and moneys which shall at any time become payable to said party of the first part under or by virtue of the terms and provisions of the said Will of William Blair, deceased.

"All payments hereunder shall be made in person to said party of the second part and not upon any written or verbal order nor upon any assignment, nor upon any transfer by

operation of law, and shall cease upon the death of either party hereto."

At several subsequent dates the taxpayer executed like indentures providing for additional annual payments to his three children named above, and also in a similar manner provided for the payment of certain sums to his fourth child, William McCormick Blair. During the years in question the taxpayer's children reported as income the following sums, which were added to the income reported by the taxpayer for the years in question:

	1924	1925	1926	1929
Lucy Blair Linn	$10,000	$12,500	$18,000	$18,000
Edith Blair	10,000	14,000	15,000	15,000
Edward Seymour Blair	10,000	18,000	18,000	18,000
Wm. McCormick Blair		4,000	6,000	6,000

The identical issue involved in this case was presented to the Board by this taxpayer at 18 B. T. A. 69, wherein the [fol. 112] Board held adversely to the Commissioner. On appeal the Circuit Court of Appeals for the Seventh Circuit reversed the Board in Commissioner v. Blair, 60 Fed. (2d) 340, certiorari denied 288 U. S. 602. The Circuit Court, however, passed only upon the question as to whether or not the taxpayer was the beneficiary under a spendthrift trust and did not discuss the question as to whether the indentures provided for assignments of future income or assignments of a present interest in property. Subsequent to the decision of the Circuit Court of Appeals in Commissioner v. Blair, supra, the Appellate Court of the State of Illinois for the First District, in a suit between the trustees under the will of William Blair and the beneficiaries under the taxpayer's assignments, reversed the lower court (Superior Court of Cook County) by a two to one decision, wherein it was held that the trust was not a spendthrift trust. No appeal was taken to the Supreme Court of Illinois, the highest state court.

III

The said Commissioner being aggrieved by the conclusion of law contained in the opinion of the United States Board of Tax Appeals entered January 31, 1935, and by the final decision entered by it on March 22, 1935, desires to obtain

a review thereof by the United States Court of Appeals for the Seventh Circuit.

Wherefore, he petitions that a transcript of record be prepared in accordance with the rules of the United States Circuit Court of Appeals for the Seventh Circuit, and transmitted to the Clerk of said Court for filing and appropriate action to the end that the errors complained of may be reviewed and corrected by the United States Circuit Court of Appeals for the Seventh Circuit.

IV

The Commissioner's assignments of error are as follows:

1. The Board erred in holding that the taxpayer had power to alienate the property in controversy, there being no evidence to support such finding.

2. The Board erred in not holding that the petitioner was a life beneficiary under a spendthrift trust.

3. The Board erred in holding that the taxpayer by certain indentures assigned a present interest in the estate of [fol. 113] his deceased father to his four children, there being no evidence to support such finding.

4. The Board erred in not holding that the taxpayer was taxable on all of the income accruing from his deceased father's estate, including that portion assigned to his four children.

5. The Board erred in holding that itewas not required to follow the decision of the Seventh Circuit Court of Appeals in Commissioner v. Blair, 60 Fed. (2d) 340.

6. The Board erred in not holding that the question as to whether a spendthrift trust was created was res adjudicata.

(Signed) Frank J. Wideman, Assistant Attorney General. (Signed) Robert H. Jackson, Assistant General Counsel for the Bureau of Internal Revenue. Of Counsel: Bruce A. Low, Special Attorney, Bureau of Internal Revenue.

Duly sworn to by Bruce A. Low. Jurat omitted in printing.

[fol. 114] IN UNITED STATES CIRCUIT COURT OF APPEALS

* * * (Caption) * * *

NOTICE OF FILING PETITION FOR REVIEW—Filed June 27, 1935

To Edward T. Blair, 1516 Lake Shore Drive, Chicago, Illinois; J. F. Dammann, Esq., 120 West Adams Street, Chicago, Illinois:

You are hereby notified that the Commissioner of Internal Revenue did, on the 12th day of June, 1935, file with the Clerk of the United States Board of Tax Appeals, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Seventh Circuit, of the decision of the Board heretofore rendered in the above-entitled case. A copy of the petition for review and the assignments of error as filed is hereto attached and served upon you.

Dated this 12th day of June, 1935.

(Signed) Robert H. Jackson, Assistant General Counsel for the Bureau of Internal Revenue.

Personal service of the above and foregoing notice, together with a copy of the petition for review and assignments of errors mentioned therein, is hereby acknowledged this 14 day of June, 1935.

J. F. Dammann, Attorney for Respondent on Review.

IN UNITED STATES CIRCUIT COURT OF APPEALS

* * * (Caption) * * *

PRÆCIPE FOR RECORD—Filed September 9, 1935

To the Clerk of the United States Board of Tax Appeals:

You will please prepare, transmit and deliver to the Clerk of the United States Circuit Court of Appeals for the [fol. 115] Seventh Circuit, copies duly certified as correct of the following documents and records in the above-entitled cause in connection with the petition for review by the said Circuit Court of Appeals for the Seventh Circuit, heretofore filed by the Commissioner of Internal Revenue:

1. Docket entries of the proceedings before the Board.
2. Pleadings before the Board.

(a) Petitions, including annexed copies of deficiency letters.

(b) Answers.

3. Findings of fact, opinion and decisions of the Board.

4. Petition for review, together with proof of service of notice of filing petition for review and of service of a copy of petition for review.

5. Statement of the evidence as settled and allowed.

6. Order enlarging time for the preparation of the evidence and for the transmission and delivery of the record.

7. This præcipe.

(Signed) Robert H. Jackson, Assistant General Counsel for the Bureau of Internal Revenue.

Service of a copy of the within præcipe is hereby admitted this 28 day of Aug., 1935.

J. F. Dammann, Calvin F. Selfridge, Attorney for Respondent.

BEFORE UNITED STATES BOARD OF TAX APPEALS

* * * (Caption) * * *

ORDER AS TO STATEMENT OF EVIDENCE—Entered October 2, 1935

The Board having promulgated its findings of fact and opinion in the above-entitled proceedings on January 31, 1935, and having entered its decisions in such proceedings on March 22, 1935, and March 25, 1935, respectively, counsel for the respondent having duly filed a petition for review of the Board's decisions by the United States Circuit Court of Appeals for the Seventh Circuit and having filed with the Board a præcipe calling for the transmission, among other things, to the Circuit Court proposed "State-
[fol. 116] ment of Evidence" which is approved by counsel for the petitioner, now therefore, the premises having been duly considered, it is

Ordered that the clerk of this Board be and he hereby is directed to omit any statement of evidence in the record to be transmitted by him to the United States Circuit Court of Appeals for the Seventh Circuit. (See memorandum attached.)

(Signed) Stephen J. McMahon, Member. (Seal.)

October 2, 1935.

BEFORE UNITED STATES BOARD OF TAX APPEALS

* * * (Caption) * * *

MEMORANDUM

The respondent, in his petition for review, does not assign any error in the admission or rejection of evidence or on the ground that a finding of the Board is unsupported by any evidence. Accordingly under section II of Rule 32 of the United States Circuit Court of Appeals for the Seventh Circuit, no statement of evidence is permitted or required. Joseph E. Uihlein, 31 B. T. A. 932.

In its report the Board stated: "These proceedings were submitted upon a stipulation of facts and certain exhibits, all of which we incorporate herein by reference." Under section IV of Rule 32 of the United States Circuit Court of Appeals for the Seventh Circuit, the clerk of this Board will transmit as a part of the record the findings of fact of the Board which, by virtue of the above quoted statement, includes the stipulation of facts and the exhibits. Thus the United States Circuit Court of Appeals for the Seventh Circuit will have before it all the evidence submitted to the Board and to send up as a part of the record, a statement of evidence, would be an unnecessary duplication and would serve no useful purpose. The proposed statement of evidence contains the same stipulation and exhibits as were made a part of the findings of fact of the Board as appears from the above quoted language.

(Signed) Stephen J. McMahon, Member. (Seal.)

October 2, 1935.

[fol. 117] Clerk's certificate to foregoing transcript omitted in printing.

BEFORE UNITED STATES BOARD OF TAX APPEALS

* * * (Caption) * * *

ORDER ENLARGING TIME—Entered August 1, 1935

On motion of counsel for petitioner, it is

Ordered: That the time for preparation of the evidence and transmission and delivery of the record sur petition

for review of the above entitled proceeding by the United States Circuit Court of Appeals, Seventh Circuit, be and it is hereby extended to September 12, 1935.

(Signed) Eugene Black, Member.

Dated Washington, D. C., August 1, 1935.

Now, October 18, 1935, the foregoing order enlarging time certified from the record as a true copy.

B. D. Gamble, Clerk, U. S. Board of Tax Appeals.
(Seal.)

[fol. 118] Before United States Board of Tax Appeals

* * * (Caption) * * *

Order Enlarging Time—Entered September 12, 1935

For cause appearing of record, it is

Ordered: That the time for preparation of the evidence and transmission and delivery of the record sur petition for review of the above entitled proceeding in the United States Circuit Court of Appeals for the Seventh Circuit, be and it is hereby extended to November 1, 1935.

(Signed) Eugene Black, Member.

Dated Washington, D. C., Sept. 12, 1935.
jd

Now, October 18, 1935, the foregoing order enlarging time certified from the record as a true copy.

B. D. Gamble, Clerk, U. S. Board of Tax Appeals.
(Seal.)

[fols. 119 & 120] Clerk's certificate to foregoing transcript omitted in printing.

[fols. 121-123] Appearances of counsel omitted in printing.

[fol. 124] IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

MINUTE ENTRY—February 25, 1936

Now this day come the parties by their counsel and this cause now comes on to be heard on the printed record and briefs of counsel and on oral arguments by Mr. L. W. Post, counsel for Petitioner, and by Mr. J. F. Dammann, Counsel for Respondent, and the court having heard the same, takes this matter under advisement.

[fol. 125] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT, OCTOBER TERM, 1935, JANUARY SESSION, 1936

No. 5648

COMMISSIONER OF INTERNAL REVENUE, Petitioner,

vs.

EDWARD T. BLAIR, Respondent

Petition for Review of Decisions of the United States Board of Tax Appeals

OPINION—Filed April 11, 1936

Before Evans and Alschuler, Circuit Judges, and Baltzell, District Judge

EVANS, Circuit Judge:

The taxability of a beneficiary under a testamentary trust for income theretofore assigned by him to his children is before this court for the second time. We previously held (60 F. (2d) 340) it to be a spendthrift trust under the Illinois law and held the income for 1923 taxable to the assignor. The instant appeal involves identical facts, except that the tax years involved are 1924 to 1926 and 1929, and reference is therefore made to our previous opinion for a statement of facts.

After the opinion of this court was announced, the trustees under the testamentary trust instituted suit against

assignees in the Superior Court of Illinois to determine the validity of the assignments so they might know whether they were validly paying the beneficiary's income to the assignees, instead of paying it to the beneficiary. The Superior [fol. 126] Court held, following this court's view, that this was a spendthrift trust and no assignment of income could be validly made. On appeal the Illinois Appellate Court for the first district reversed (274 Ill. Ap. 23) the Superior Court's ruling and held the trust not to be of spendthrift character and held the assignments valid and directed the Superior Court to enter a decree accordingly. The Board of Tax Appeals in the instant suit felt compelled to follow the Illinois Appellate Court decision which was rendered after the Circuit Court of Appeals decisions. From the Board's decision, the Commissioner appeals.

Under the assignments, taxpayer's children received income as follows: 1924, $30,000; 1925, $48,000; 1926, $57,000; and 1929, $57,000. The children have paid tax on these sums and, since the Commissioner's determination against respondent, have filed claims for refunds which will not be acted upon until after termination of the case.

It is petitioner's chief contention that in spite of the assignment the income is nevertheless taxable to respondent because he had assigned merely the right to future income and no present interest or estate in the corpus. This court on the previous appeal found it unnecessary to pass on that question. (60 F. (2d) 340.)

Respondent maintains that the decree of the Illinois Superior Court (pursuant to the Appellate Court's mandate) is decisive of the property rights of the respective parties and also insists that an existing property right was duly assigned by Blair, the beneficiary, to his children.

Ch. 37, Sec. 41, Smith-Hurd Ill. Ann. Stats., provides:

"All opinions or decisions of said court upon a final hearing of any cause, shall be reduced to writing by the court, briefly giving therein the reasons for such opinion or decision, and be filed in the cause in which rendered."

This section amended, on April 25, 1935, the same section as previously existing by striking therefrom the proviso:

"Provided, That such opinion shall not be of binding authority in any cause or proceeding, other than in that in which they may be filed."

Binding Effect of State Court Determination of Rights Under Trust. We are first called upon to determine whether the decree of the Superior Court of Illinois, entered pursuant to a direction from the Illinois Appellate Court, adjudging the trust not a spendthrift trust and holding valid the assignments of income therefrom, is binding upon this [fol. 127] court in an income tax case, especially in view of the fact that on another occasion we held the trust to be a spendthrift trust. 60 F. (2d) 340.

We are of the opinion that the inferior state court's decree adjudging the rights between the parties must be followed by this court.

A somewhat analogous case is that of Freuler v. Helvering, 291 U. S. 35. There, the Court was passing upon the taxability of income distributed to the beneficiaries, which income represented depreciation of the corpus of the trust. The state court (California Probate Court), in an independent suit, held that the trustee should have reserved the amount which represented the depreciation. The Court, in that case, was construing section 219 (a), Act of 1921, which provides:

"* * * the tax shall not be paid by the fiduciary, but there shall be included in computing the net income of each beneficiary that part of the income of the estate or trust for its taxable year which, pursuant to the instrument or *order* governing the distribution, is distributable to such beneficiary, whether distributed or not, * * *."

The Court held the California Probate Court decree to be binding. It said:

"We think the order of the state court was the order governing the distribution within the meaning of the Act. Moreover, the decision of that court, until reversed or overruled, establishes the law of California respecting distribution of the trust estate. It is none the less a declaration of the law of the State because not based on a statute, or earlier decisions. The rights of the beneficiaries are property rights and the court has adjudicated them. What the law as announced by that court adjudges distributable is, we think, to be so considered in applying Section 219 of the Act of 1921. * * *

"The decree was a judgment which fixed the rights of the remaindermen and the obligations of the life tenants."

The court also said:

"The word 'order' (in the statute) must be given some meaning as applied to trust income which is to be distributed periodically; and we think it clear that the section intended that the order of the court having jurisdiction of the trust should be determinative as to what is distributable income for the purpose of division of the tax between the trust and the beneficiary."

[fol. 128] The court does not discuss the fact that the decree was that of an inferior tribunal. It was passing upon a different subsection of the Act, one having a specific provision commanding recognition of an "order" governing distribution. The statute did not specify the rank of the court which made the order.

Although there are these distinctions between the Freuler case and the instant one, we accept it as authority for holding that a final decree of a state court, supreme or inferior, entered in a specific matter such as the interpretation of rights under a testamentary trust, is binding upon a Federal court in determining the character of a trust, the income from which is the subject of a Federal tax.

The logic supporting the adoption of such a rule is the same as that which furnishes the basis of res judicata. We are adopting the ruling of a court having jurisdiction of the subject matter and of the person. The orderly administration of justice and final settlement of property rights will be promoted by so doing. It is true that this court has previously reached a contrary conclusion—that the trust was a spendthrift one—but our decision was before the Illinois court had declared itself in reference to a matter to which its jurisdiction extended. Moreover, the previous proceeding in this court was one to which the beneficiaries were not a party, whereas they were the parties to the state court proceeding.

This conclusion is not inconsistent with that announced in Graham v. White-Phillips Co., 296 U. S. 27 (same case in this court, 74 F. (2d) 417), wherein the Supreme Court held that an Illinois Appellate Court decision was not binding upon this court in the construction of the Uniform

Negotiable Instruments Law. The Court there pointed out that the Illinois appellate decisions were not in accord on that question; that a statute provided that their opinions "shall not be binding authority in any case or proceeding other than that in which they may be filed." This proviso, as above pointed out, has since been repealed. The effect of such repeal is undetermined. As the section now stands, it merely provides for the reducing of opinions to writing upon final hearing.

It may well be argued that the repeal of the provision making the decision binding only in the cause in which it is filed extended the scope and effect of the decisions of the Illinois Appellate Courts. That would be our view of its effect. But, it is for the Illinois courts to finally determine the effect of this repeal statute, and when those courts have spoken we will willingly adopt their construction.

[fol. 129] We rest our conclusion not upon the effect of the repeal of the state statute, but upon the judicial determination of rights by a court of competent jurisdiction authorized to hear and determine the rights of the parties under this testamentary trust. The final decision of such a court, which is not appealed from, is binding upon the Federal court for the purpose of determining the character of the trust which in turn may be determinative of a Federal income tax assessment.*

The correctness of our conclusion is not entirely free from doubt. We would be better satisfied if the suit in the state court had been more adversary in its nature. There is that which suggests a friendly suit to avoid taxes, to which there was no opposition or adverse party. All who joined in the litigation were desirous of obtaining the same end—the avoidance of a large part of the Federal income tax through division of the income by the beneficiary among his children. The Government was not a party to that suit. The suit was prosecuted only until a favorable decision was reached and then no appeal was taken. The first court ruled adversely to the complainants. On appeal a favorable decree was entered. There was no one interested in taking the case to the Illinois Supreme Court and

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* This conclusion seems to be somewhat at variance with the decision in Miss. Valley Trust Co. v. Commissioner, 72 F. (2d) 197. But, see Hubbell v. Helvering, 70 F. (2d) 668, by the same court.

the litigation ceased. In other words it was not unlike a consent decree. But consent decrees are binding if entered by a court of competent jurisdiction with the parties properly before it, in the absence of a showing of collusion between the parties or fraud upon the court. The record before us does not show either collusion or fraud, save by circumstances which are also consistent with good faith on the part of the litigants. We, therefore, accept the Illinois Appellate Court decision as controlling upon the nature of this trust.

Did Assignments Effectively Bar Taxation of Income to Assignor? Respondent executed eleven assignments during the period from 1923 to 1926 in varying amounts to his four children, individually. The assignments were similar in form, reciting a consideration of one dollar, and were to continue until the death of either party to the assignment. Each document assigned, sold, and transferred to the assignee an interest, in a specified amount for each calendar year thereafter, in the net income which the assignor is or may be entitled to receive during his life from the trustees under the will of his father, and empowered [fol. 130] the assignee to receipt for the amount. Excerpts from the will and the assignments are set forth in the margin.* The assignments were made after testator's

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* The will provided:

"Fourteenth:—To my nephew Chauncey J. Blair and my son Edward Tyler Blair, of Chicago, I give devise and bequeath all the rest and residue of my * * * estate * * *. To have and to hold the same to them and to the survivor of them and to their successors, and to the heirs, executors and administrators of such survivor and successor, but in trust however to and for the following uses and purposes namely: in trust to hold, manage control, improve and lease the same, at their discretion, and the same to keep well insured and in good and tenantable repair and condition * * * and the income from said trust fund and estate to use expend account for and pay as follows to wit: * * *

"B. To pay to my said wife, as the same shall from time to time be received, one equal half part of all the net income which shall arise or accrue from the said trust fund * * *

"C. To pay to my said son, as the same shall from time to time be received, the other equal half part of all the net

wife died and at a time when Blair was entitled to the entire income from the trust for life. It also provided that [fol. 131] the income in the hands of the trustees should not be subject to the debts or obligations of Blair.

It is the Commissioner's contention that the respondent is liable for income taxes upon the income which was paid to his children, by virtue of the assignments, because the nature of respondent's interest was not that of a present property right capable of being assigned in praesenti—that, to avoid the tax, the assignor's interest must be an interest in the corpus of the trust or in the property from which the income accrued. Had he such a property interest and assigned it with the right to receive future income therefrom, then he could divest himself of tax liability upon said income.

A somewhat complete collection of cases is here attempted.

The Supreme Court has not had occasion to pass upon the identical question. In the case of Lucas v. Earl, 281 U. S. 111, an attorney assigned to his wife one-half of all income he should earn. The court held that notwithstand-

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income which shall arise * * * from the said trust fund * * * during the full term of his natural life.

"D. At and after the decease of my said wife to pay my said son the whole of said net income for and during the full term of his natural life.

"E. At and after the decease of my said son, he leaving no child or children, * * * him surviving but leaving his said wife him surviving * * * to pay to the said wife of my said son one equal third part of said net income for and during the full term of the natural life of my said wife * * *.

"I. At and after the decease of my said wife, and of my said son and of the said wife of my said son, leaving them surviving no child or children nor any descendants of any deceased child or children of my said son, then to distribute * * * the whole * * * to my heirs at law; * * *

"Twenty:—I do hereby declare and direct that the income from said trust fund and estate which is herein ordered to be, from time to time as the same shall be received paid to my said wife and to my said son and to his said wife

ing this assignment the husband was taxable upon the entire income earned, because the taxing act specifically taxed the earner of the income, and he could not escape the tax through an assignment of future earnings in whole or in part.

In an assignment of future partnership income by a husband, who was a partner, to his wife (Burnet v. Leininger, 285 U. S. 136), the court held the income was taxable to the partner and not to the wife inasmuch as the tax was upon a partner's income. In Corliss v. Bowers, 281 U. S. 376, the taxpayer transferred a fund in trust, the income payable for life to his wife, but he retained the complete power of revocation. The court held the income was taxable to the donor, entire emphasis being placed upon the taxpayer's unfettered control of the trust.

See also Douglas v. Willcuts, 296 U. S. 1, 9.

This circuit, in the case of Rosenwald v. Commissioner, 33 F. (2d) 423, was passing upon the effect of an assignment by Rosenwald to the trustees of a charitable fund he had created, of all dividends and interest and rents on cer-

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and to their children and descendants of children in the cases aforesaid shall be paid to them directly upon their separate order and receipt therefor, for their sole and separate use respectively, and that *the same shall not be nor be made nor held in any manner nor by any proceedings whether in law or equity while yet in the hands of said trustees liable for or subject to the payment of any of the debts or obligations of either of the persons entitled to the same as above herein set forth.*"

The assignments provide:

"This Indenture Made and entered into * * * by and between Edward T. Blair * * * party of the first part, and Lucy Blair Linn, * * * party of the second part, Witnesseth:

"That the said party of the first part, in consideration of love and affection and One Dollar ($1) * * * does hereby sell, assign, transfer, * * * an interest amounting to * * * $6,000 for the remainder of the current calendar year, and * * * $9,000 in each calendar year thereafter in the net income which the said party of the first part now is, or may hereafter be, entitled to receive during his life, from the Trustees under the Will of Wil-

tain stocks, mortgages, bonds, and leaseholds, for a period of five years. We held Rosenwald was nevertheless taxable as to the income passing to the trust fund, on the ground that the taxpayer in actuality retained dominion over the income by virtue of the right to dispose of the principal. It was pointed out that there might be a difference if the corpus of stocks, leaseholds, etc., had been [fol. 132] conveyed to trustees irrevocably, or for a term of years and who, in turn, were to pay over the income.

Another case decided by this court is that of Shellabarger v. Commissioner, 38 F. (2d) 566, wherein two sisters made a contract whereby one agreed to assign to the other, income which she was to receive under their father's testamentary trust if the assignee-sister did not contest the will. This court held the assignee liable for income tax on the income from the trust, even though it was first paid to the assignor. It was pointed out that there was no power of revocation in the assignor although the assignee's income was to cease if she should at any time start contest of the will. The court said:

"* * * where the beneficiary of a trust assigns an interest in the income therefrom, the grantee who received the income pursuant to the agreement, and not the grantor, is liable for the federal income tax thereon."

There is no contention made that the assignments in the case at bar were revocable. An examination of the assignments shows they ceased upon the death of either party. The case turned upon the facts peculiar to that case.

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liam Blair, Deceased * * * and the said party of the first part hereby authorizes * * * said party of the second part * * * to receive and receipt to the Trustees under the Will * * * of the income and moneys which shall at any time become payable to said party of the first part under or by virtue of the terms and provisions of the said Will * * *.

"All payments hereunder shall be made in person to said party of the second part and not upon any written or verbal order nor upon any assignment, nor upon any transfer by operation of law, and shall cease upon the death of either party hereto. * * *"

In the Sarther Grocery Co. v. Commissioner, 63 F. (2d) 69, case, this court said that the Shellabarger case "was peculiar in its facts," which indeed it was, particularly in the fact that the transfer to the sister of part of the income from the trust estate was in settlement of a threatened will contest, which, had it been successful, would have entirely defeated the trust.

In the case of Bishop v. Commissioner, 54 F. (2d) 298, this court was passing upon the taxability of insurance renewal commissions where the agent previously assigned to his wife one-third of all renewal commissions which he thereafter would receive under his contract with his employer insurance company. The court, nevertheless, held the husband-assignor taxable on the assigned income, pointing out the uncertainty at the time of assignment of the accrual of renewal commissions. In this case this court intimates that there needs be some property owned capable of assignment in praesenti before tax liability can be avoided. We said:

"* * * We are convinced that the subject-matter of petitioner's assignment to his wife was income per se, and that it was not in any sense a present property right which was itself productive of income. * * * what property did she then own which produced these commissions? Certainly none, * * * It is perfectly obvious from this [fol. 133] language (in the assignment) that petitioner had no intention of conveying a property right in praesenti, but only in future income as it might become due to him. This brings the case squarely within the rule that instruments intended to deflect income subsequently falling due serially are unavailing for tax purposes. * * *."

In Copland v. Commissioner, 41 F. (2d) 501, a husband assigned to his wife all his interest in a stock syndicate and all income to be derived therefrom (although he remained liable for losses). This court held the income taxable to the wife, pointing out that there had been an irrevocable transfer of interest in the syndicate—in the corpus of the syndicate as well; that lack of consideration was immaterial inasmuch as the gift was completed; that the syndicate was not in essence a partnership so that the income constituted remuneration for personal services.

The Court of Appeals of the third circuit, in the case of Nelson v. Ferguson, 56 F. (2d) 121, passed upon a case where an employee had vested title to a patent in his employer (defeasible on certain conditions) reserving the right to a certain share in the profits from the patent. The court stated that this right to profits was such a present property right that it might be assigned to a wife irrevocably, and he be thereby relieved of income taxes upon the profits passing to her under the assignment. The court pointed out that what was assigned was not future salary (as in the Earl case) or of things not then in existence, but was an existing thing—property in a contract.

"The assignment being of property was therefore not merely an assignment of income when earned, though from the property assigned profits and income were expected to flow. * * * Though the future income from this property right was uncertain and contingent as to amount, the right itself, the thing assigned, was fixed and certain—not revocable (as in the Corliss case) and was independent of any future service or any future action on the part of the assignor."

In discussing the Earl case, the court said:

"There was no existing thing, tangible or intangible, to which at its execution the contract could presently attach. * * * One-half of the husband's earnings never could be paid to the wife unless and until earnings had accrued to him on account of things he had done, services he had rendered. * * *"

[fol. 134] The Court of Appeals of the second circuit passed upon an analogous question in the case of Commissioner v. Field, 42 F. (2d) 820, where a beneficiary under a trust assigned to his wife two-thirds interest in all income he received from the trust. The assignor also was to receive the corpus of the trust when he was fifty, and he also had the right to terminate the trust at any time. The court held the assignor nontaxable as to the income assigned. It said:

"* * * So far as we know, it is universally true that the law considers an equitable interest for life or for a term of years as present property, alienable like any other

* * *. The law of Illinois is the same * * *. In * * * 268 U. S. 161, * * * a series of payments of income was treated as integrated into an existing interest, and for that reason alone the payments were income. No doubt the difference is conventional; there is no inherent reason why other series of future installments should not be regarded as constituting a single right, as is an annuity or the reversion of a sublease. Some are, some are not; the distinction is historical, not rational. The interest * * * was presently assignable like a bond or building * * *."

This court commented upon the Field case in the Bishop case, saying:

"In that case the income on the trust fund was not contingent—it was a present right, and fixed in all respects except as to amount."

Two District Court cases, O'Malley-Keyes v. Eaton, 24 F. (2d) 436, and Young v. Gnichtel, 28 F. (2d) 789, held the assignors to be nontaxable as to income passing to assignees under irrevocable assignments of interests in trust funds.

The Court of Appeals in the eighth circuit in Van Meter v. Commissioner, 61 F. (2d) 817, held insurance renewal commissions taxable to the earner thereof despite assignment and payment of commissions directly to assignee.

In Helvering, Commissioner v. Coxey, 79 F. (2d) 661 (C. C. A. 3), taxpayer was to receive entire income for life from residuary trust under his father's will, the corpus to go to his children upon his death. There was no restriction upon the right to assign. The taxpayer by an irrevocable assignment to his wife, from whom he was separated, assigned $8,400 per annum during her life and the life of the children. The wife agreed to ask for no further support for [fol. 135] herself or her children. She also released all dower right in taxpayer's property. The trustee had paid her the sum agreed upon for two years. The court said:

"He made an irrevocable assignment and retained no control over what he assigned. The courts and this board have held that the owner of such property, who absolutely and irrevocably divests himself of all or a part of the prop-

erty, is no longer burdened with tax on the income from the part assigned. * * * In so holding the board committed no error. The assignment was absolute, irrevocable, and so far as the part assigned was concerned, extinguished all future income which otherwise would have accrued to the taxpayer * * *."

In Brewster v. United States, 9 F. Supp. 686, the Court of Claims said:

"It is not denied that the income here in dispute received by plaintiff from her father's estate would have been taxable to her had she not entered into a contract with her brother Paul providing for the payment of a portion thereof to him. The character of the income rendered is taxable under the statute and the only question is whether the payments to her brother, in fulfillment of her agreement with him, had the effect of transferring the tax liability to her brother Paul. We think the agreement in question was not an assignment of property from which the income in question was derived, and in the situation here presented the amounts involved had to become income to plaintiff before she could pay them to her brother. The agreement between them imposed no obligation on the trustees to pay the brother any amount. The trustees were not parties to the contract and their only obligation, in so far as the case is concerned, was to pay the income from the trust fund to the plaintiff. * * * From a consideration of the agreement and the surrounding facts and circumstances, we are of opinion that the contract did not constitute an assignment by plaintiff of any portion of the trust income as such, nor did it create in Paul any ownership of any part of such income. * * * (The court said it was unable to agree with the Shellabarger case.) * * * Upon the facts in this case, we are of the opinion the amounts paid by plaintiff to her brother Paul, pursuant to the agreement between them, were first income to her and were properly included in her gross income by the defendant. * * *"

[fol. 136] In Wood v. Commissioner of Internal Revenue, 74 F. (2d) 78 (C. C. A. 6), the court said:

"The sole legal question is whether one-half of the dividends paid by E. & Co. in 1926 on shares of stock held by

the trustees of the estate of W. was income to petitioner who received; under the decedent's will, the right to the net income from such estate for life, or whether such sum was income to petitioner's children, to whose trustees she had released one-half of the net income resulting from the investment in E. & Co.

"* * * The Court of Claims held that the assignment of income as it is received does not relieve from tax thereon the person to whom the income was payable in the first instance. This decision was correct. (The court pointed out that the trustees of the decedent's estate could at any time sell the stock of E. & Co. and thereby cut off the income.) * * * All future payments into the trust estates were of anticipatory income. * * * The dividends attempted to be released might never be received. There was no assignment, release, or transfer of the property right which produced the income. Every case cited on this point for the petitioner depends for its decision upon a finding that an existing property right had been assigned. We search this record in vain for an assignment in praesenti, and find only a release of income that might or might not be earned in the future. Such an arrangement could not relieve the petitioner of the tax. * * *"

See also Porter v. United States, 52 F. (2d) 1056.

It is not easy to reconcile the twentieth paragraph of the will with any conclusion which would exempt the beneficiary, Blair, from income tax upon the entire income. The provision that—

"* * * the same shall not be nor be made nor held in any manner nor by any proceedings whether in law or equity while yet in the hands of said trustees liable for or subject to the payment of any of the debts or obligations of either of the persons entitled to the same as above set forth"

is inconsistent with the income's assignability to pay debts or for any other purpose, until after it has become the property of said beneficiary. It is at least persuasive of the construction which we must place upon the character of the beneficiary's interest.

[fol. 137] Considering all the evidence, we are convinced that the entire income was properly chargeable to Blair for the purpose of determining his income tax.

The question is not one of the validity of the assignments but for the purpose of determining income tax liability it is one involving the date when the income became transferable. This question turns upon whether the assignor had such an interest in the corpus of the trust as to permit of its transfer or whether the assignor's interest was separate from the property and limited to the income which accrued from year to year.

The latter seems to be the situation. The testator made an income provision for his son. It was in the trustees' hands beyond the reach of the son's creditors. The son could not create obligations enforceable against it. Upon the son's death the said income ceased. It passed to either his children or to the heirs of the testator or in part to the widow of the son, depending upon survivorship, etc. The income passed to them not by act of the son, but by the testamentary trust provision of the testator. The son's interest was therefore not in any way attached to the corpus of the estate that produced the income. The income was not even subject to his disposition until he received it. The attempted assignment to his children was in legal effect merely a direction to the trustees to pay to his children, out of the income due to him, various specified amounts each year. It does not militate against the conclusion that the income was his, and was due to him. While he could authorize the trustees to deliver to another what was due to him, it was not deliverable until it was his to dispose of.

The order of the Board of Tax Appeals is reversed with directions to enter an order in accordance with the views here expressed.

[File endorsement omitted.]

[fol. 138] IN UNITED STATES CIRCUIT COURT OF APPEALS

5648

COMMISSIONER OF INTERNAL REVENUE

vs.

EDWARD T. BLAIR

Petition for Review of Order of the United States Board of Tax Appeals

JUDGMENT—April 11, 1936

This cause came on to be heard on the transcript of the record from the United States Board of Tax Appeals, and was argued by counsel.

On consideration whereof: It is now here ordered and adjudged by this court that the decisions entered in this cause on March 22, 1935 and March 25, 1935, by the United States Board of Tax Appeals, be, and the same are hereby reversed; and that this cause be, and same is hereby remanded to the said United States Board of Tax Appeals with directions to enter an order in accordance with the views expressed in the opinion of this court.

RECITAL AS TO PETITION FOR REHEARING

And afterwards, to-wit: On the first day of May, 1936, there was filed in the office of the Clerk of this court, a Petition for a Rehearing, which said Petition for a Rehearing is not copied here.

[fols. 139 & 140] IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

ORDER DENYING PETITION FOR REHEARING—May 27, 1936.

It is ordered by the court that the Petition for a Rehearing in this cause be, and the same is hereby denied.

IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

ORDER STAYING MANDATE—May 29, 1936

On motion of counsel for respondent, It Is Now Here Ordered, that the mandate in this cause be, and the same is hereby stayed until the further order of court.

It Is Further Ordered that counsel for respondent file in this court proof of the filing of the petition for a writ of certiorari in the Supreme Court of the United States upon the filing of said petition in said court.

[fol. 141] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 142] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 12, 1936

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 40,787. U. S. Circuit Court of Appeals, Seventh Circuit. Term No. 247. Edward T. Blair, petitioner, vs. Commissioner of Internal Revenue. Petition for a writ of certiorari and exhibit thereto. Filed July 31, 1936. Term No. 247, O. T., 1936.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1935.

No. 247

EDWARD T. BLAIR,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, FOR THE SEVENTH CIRCUIT.

PETITION FOR WRIT OF CERTIORARI.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1935.

No. .....

EDWARD T. BLAIR,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, FOR THE SEVENTH CIRCUIT.

To the Honorable Judges of the Supreme Court of the United States:

The petition of Edward T. Blair respectfully shows:

Opinions Below.

The opinion of the Board of Tax Appeals in the present case (R. 91 to 108) is reported in 31 B. T. A. 1192. The opinion of the United States Circuit Court of Appeals, for the Seventh Circuit, reversing the Board of Tax Appeals (R. 125) is reported in 83 Fed. (2) 655.

Jurisdiction.

Judgment of the United States Circuit Court of Appeals was rendered on the 11th of April, 1936 (R. 125-138). A petition for rehearing duly filed was denied on May 27, 1936 (R. 139).

Jurisdiction of the court is invoked under Section 240 (a) of the Judicial Code as amended by an Act of February 13, 1925.

The Question Presented.

There is here involved a matter of individual income taxes for the taxable years 1924, 1925, 1926 and 1929. The question presented is whether income paid from a trust estate to assignees under assignments made by a life beneficiary of the trust estate, and held valid by the courts of the State of Illinois having jurisdiction over the matter, should be taxed to the original beneficiary, the assignor, despite the assignments and the actual payment of the income to the assignees.

The Statutes Involved.

The statutes involved impose an income tax upon the income of individuals. So far as the question here presented is concerned there is no material difference between the various statutes in force during the respective tax years. The pertinent provisions of the 1924 statute are to be found in the appendix attached hereto.

Specification of Errors to Be Urged.

The Court below erred

1. In reversing the decision of the United States Board of Tax Appeals.

2. In holding that the income in question paid from the trust estate created under the will of William Blair to the assignees named in the assignments in question was the income of the taxpayer, and therefore taxable to him.

STATEMENT.

The facts were stipulated (R. 28) and as so stipulated were included in the findings of fact entered by the Board of Tax Appeals (R. 94).

We summarize them as follows:

William Blair, father of the petitioner, died in 1899 (R. 28) leaving a last will, whereby he created a trust for the benefit of his wife and son, Edward T. Blair. They were to be paid certain proportions of the income during their respective lives (R. 32, 35, 36, 28). Upon the death of Mrs. William Blair the entire income was to be paid to Edward Blair.

The trust was to continue during the lives of the wife and son, and at the death of the survivor (subject to limitations not here important) the principal of the trust was to pass to Edward Blair's children (R. 37).

Mrs. Blair died in March, 1923, and Edward Blair became the sole life beneficiary and entitled to all of the income (R. 28). He immediately, within a few days, made the first of the assignments in question of portions of his interest to his children (Petitioner's Exhibits 2, 3 and 4; R. 42 and 43). Following these he made others (Ex. 5-11, R. 45-51). The assignments were all in writing and were in the form of written contracts between Mr. Blair and his children respectively. The children were all adults, and were the same who would be entitled to the principal at his death. No contention has ever been made that in fact these contracts of assignment were made to meet any obligation of Mr. Blair towards his children such as was the purpose of the assignments in the cases of *Helvering* v. *Schweitzer*, 296 U. S. 551; *Helvering* v. *Stokes*, 296 U. S. 551, and *Douglas* v. *Willcuts*, 296 U. S. 1.

The assignments were accepted by the trustees as valid, and the income so assigned was in fact paid to the assignees respectively. They in turn duly reported such income in their respective income tax returns and paid the taxes on the income (R. 29, 30).

The Commissioner held, however, that the assignments, being merely of a life interest in the income of a trust, did not transfer a present interest in property or property rights, but constituted merely an assignment of future income if and as earned; that therefore the income was to be regarded as belonging to the taxpayer, Edward Blair, and not to the assignees; and accordingly was taxable to him.

This question first came up as to the tax year 1923 (not here involved) with reference to assignments to three of the children, the fourth assignment not having then been made.

Edward Blair appealed to the Board of Tax Appeals, which held that the assignments were valid and constituted transfers of a present property interest, and that the income thereby produced was not taxable to him (18 B. T. A. 69).

The Commissioner appealed that decision to the Circuit Court of Appeals, for the Seventh Circuit. There the principal question discussed was as to the *validity* of the assignments. The contention of the Commissioner was that the trust, being spendthrift in nature, the life beneficiary, Edward Blair, did not have the power to make a valid assignment. This question both Edward Blair and the Commissioner agreed, and the court held, involved property rights, and was therefore to be determined by the law of the State of Illinois. Those property rights not having then been determined by any Illinois court, and there being no Illinois authority that squarely passed upon the ques-

tion, the Circuit Court of Appeals itself interpreted the related decisions of the courts of Illinois, and held that under those decisions, as so interpreted, the particular language of the will established a spendthrift trust and deprived Edward Blair of any power to make a valid assignment. Hence it decided that the assignments were invalid, transferred no interest whatsoever, and that therefore the income was taxable to Edward Blair (60 Fed. (2) 340).

The petition to this court for writ of certiorari having been denied (288 U. S. 602), the question as to that particular tax year 1923 became a final adjudication and the tax was paid.

However, the trustees and assignees, not having been parties to that case in which their property rights under the assignments had been collaterally passed upon, were left in a position of doubt. The question as to them was still open whether or not the assignments were valid under the law of Illinois, and to whom the trustees should pay the income.

Accordingly the trustees, to secure a judgment binding on all parties on this important issue, thereupon filed in the Superior Court of Cook County a bill in chancery, asking for a construction of the provisions of the will creating the trust, and for a specific determination of the question whether the assignments were valid under the law of Illinois (R. 57 to 59, particularly paragraphs 12 and 12 (d) of the bill).

In this bill the entire matter was laid before the Superior Court of Cook County, including the question as it had been presented in the Circuit Court of Appeals, the judgment of that court that the assignments were invalid, and the court's opinion, together with a reference to the authorities relied upon by the court (R. 59, 60). The bill pointed out the

dilemma of the trustees, namely, that they did not know whether to regard the assignments as valid or not, and needed to have an authoritative judgment on that point (R. 60, par. 12 (h), 13, etc. of the bill).

Answers were filed by the assignees asserting the validity of the assignments (R. 74). On the hearing which followed, the State Court decreed that under the law of Illinois the assignments were beyond the power of Edward Blair to make, and were invalid (R. 75).

The assignees appealed to the Appellate Court of Illinois, where the matter was fully presented in briefs filed and oral argument. The position of the trustees was that the decree should be affirmed, relying particularly upon the same Illinois authorities upon which the Circuit Court of Appeals in *Commissioner* v. *Blair*, 60 Fed. (2) 340, had relied, and also upon the opinion of the Circuit Court of Appeals interpreting those authorities. (See findings of fact, R. 100.)

The Appellate Court of Illinois in a written opinion thoroughly reviewing all the Illinois decisions, and also the decision of the Circuit Court of Appeals in *Commissioner* v. *Blair*, 60 Fed. (2) 340, held, one of the three judges dissenting, that under the law of Illinois, with all due deference to the decision of the Circuit Court of Appeals, there was no restraint on a voluntary alienation of his interest by Mr. Blair, and that therefore the assignments were valid. Accordingly it reversed and remanded the case to the Superior Court of Cook County, with directions to enter a decree consistent with the opinion. (R. 79, also 274 Illinois Appellate 23.)

Thereupon the Superior Court in accordance with the opinion of the Appellate Court, entered its decree that the assignments were valid and constituted voluntary assignments of "a part of the interest of Edward Tyler Blair in said trust estate." (R. 88, 90, par. 12.)

At the time of the entry of this decree the cases involving the tax years here in question were pending before the Board of Tax Appeals, and had been consolidated. The entire record of the Illinois case was introduced in evidence before the Board, including the bill of complaint, answers, decree, opinion of the Appellate Court of Illinois, and final decree of the Superior Court (R. 52-91).

Thereupon the Board of Tax Appeals entered its findings of fact (R. 91) and opinion (R. 102) holding that the decree of the Illinois court constituted the law governing the property rights of the parties; and that the income tax question was to be determined in view of that adjudication, (citing *Freuler* v. *Helvering,* 291 U. S. 35); that the assignments therefore were valid; that they constituted transfers of a present property interest in the trust estate; and that therefore the income payable, and in fact paid to the assignees on account of the assigned interest was not to be taxed to the assignor, Edward Blair (R. 91), 31 B. T. A. 1192.

On appeal by the Commissioner to the Circuit Court of Appeals, for the Seventh Circuit, that court reversed the Board of Tax Appeals, and held that while the decree of the Superior Court was a binding adjudication of the property rights of the parties, the assignments as transfers of a life interest in the income of a trust were not transfers of present interests in property, but merely of a future right to income, and that therefore the income was taxable to Edward Blair. (Sup. Rec. 125) 83 Fed. (2) 655.

It is this decision of the Circuit Court of Appeals of which a review is prayed.

REASONS FOR GRANTING THE WRIT.

First. The instant decision of the Circuit Court of Appeals for the Seventh Circuit is in conflict with several cases in other Circuit Courts of Appeal.

That conflict, we assert, lies in this:

The decree of the Superior Court of Cook County adjudicated and established the interest of Edward Blair in the trust estate, and his right to assign that interest or any part of it.

The question, therefore, presented to the Circuit Court of Appeals was solely as to the effect, from an income tax standpoint, of an assignment of that interest.

That question did not depend upon or involve the construction of any language peculiar to the trust instrument.

The question involved solely a decision as to the exact nature of the interest that any life beneficiary of the income of a trust estate has in such an estate.

That question is not peculiar to this particular trust estate, but is common to all.

The decision of the Circuit Court of Appeals on that question in this case is that the life beneficiary in the income of a trust has not an interest in the property itself; that he has merely an interest separate and distinct from the corpus and limited to the income which accrues and is distributable from year to year; that the assignment of such an interest is merely a direction to pay future income when and as earned; that therefore such income in effect belongs to and is taxable to the assignor and not the assignee to whom it is paid.

Other decisions of Circuit Courts of other circuits hold the direct opposite on this proposition.

This basic conclusion of the Circuit Court of Appeals in this case is of such importance with reference to our assertion that the decision is in conflict specificaly with the decisions of other Circuits, and in conflict also with principles laid down by this court determining the rights of life beneficiaries in trust estates, that we deem it proper to set out that conclusion in full (R. 137):

> "The question is not one of the validity of the assignments but for the purpose of determining income tax liability it is one involving the date when the income became transferable. This question turns upon whether the assignor had such an interest in the corpus of the trust as to permit of its transfer or whether the assignor's interest was separate from the property and limited to the income which accrued from year to year.
>
> The latter seems to be the situation. The testator made an income provision for his son. It was in the trustees' hands beyond the reach of the son's creditors. The son could not create obligations enforceable against it. Upon the son's death the said income ceased. It passed to either his children or to the heirs of the testator or in part to the widow of the son, depending upon survivorship, etc. The income passed to them not by act of the son, but by the testamentary trust provision of the testator. The son's interest was therefore not in any way attached to the corpus of the estate that produced the income. The income was not even subject to his disposition until he received it. The attempted assignment to his children was in legal effect merely a direction to the trustees to pay to his children out of the income *due to him*, various specified amounts each year. It does not militate against the conclusion that the income was *his*, and was due to him. While he could authorize the trustees to deliver to another what was due to him, it was not deliverable until it was *his to dispose of.*"

This decision is in conflict with *Commissioner* v. *Field*, 42 Fed. (2) 820 (Second Circuit).

The life beneficiary, Field, assigned a portion of his interest in the income of the trust estate to his wife. The

Circuit Court of Appeals for the Second Circuit held that there was a valid transfer of the property interest, and the income was not taxable to the assignor Field (page 822):

> *"So far as we know, it is universally true that the law considers an equitable interest for life or for a term of years as present property, alienable like any other."* (Italics ours.)

The decision in the instant case attempts to distinguish the Field case on the ground that Field, if he lived long enough, might have an interest in the corpus. Such a contingent interest in the corpus does not add to or detract from the intrinsic quality of the interest in the income. The distinction is based on no fundamental difference, and is therefore unsound. No case has been found adopting it. It is also at variance with the holdings of this court determining the property rights of a life beneficiary in the income of a trust estate, hereinafter referred to.

The instant decision also is in conflict with *Lowery* v. *Helvering*, (Second Circuit) 70 Fed. (2). 713. By will a decedent left to his wife during the term of her life the possession, management and control and the rents and income of his property. At her death the remainder was to go to trustees in trust for his children. The wife assigned to her children the income to which she was entitled, but not the possession, management and control. The Commissioner, the Board of Tax Appeals affirming, taxed the income to the wife, the assignor. The Circuit Court of Appeals, applying the Field case, held that the assignment was a valid assignment of a property interest and the income was not taxable to the assignor. It is to be noted that the assignor had no interest in the corpus other than as trustee, and that the assignment did not convey that interest. So that even accepting the distinction referred to above the conflict between this decision and the instant decision is complete.

The instant decision also is in conflict with *Shanley* v. *Bowers*, 81 Fed. (2) 13 (Second Circuit). Here there was a trust created by will for the benefit of the testator's son. He was to receive a portion of the income and upon the death or remarriage of his mother one-half of the corpus. He assigned his entire interest in trust, stipulating that a portion of the income was to be paid to his wife, and that the balance of the income and eventually all of the principal was to be paid to his creditors. The court, applying the Field case, holds that the income so assigned was not to be taxed to the assignor, as it was a valid assignment of a property interest.

So that as long as this condition of conflict exists whenever a life beneficiary of the income of a trust makes an assignment of the income, or a portion of it, if he lives in the Second Circuit he pays no tax on the income; if he lives in the Seventh Circuit he must pay a tax.

The instant decision is also in conflict with the following decisions:

Nelson v. *Ferguson*, 56 Fed. (2) 121 (Third Circuit).

Assignment of profits under a contract for exploitation of a patent.

Hall v. *Burnet*, 54 Fed. (2) 443 (C. C. A. Dist. of Columbia).

Assignment of insurance agent's interest in insurance premiums. Certiorari denied, 285 U. S. 552.

Helvering v. *Seatree* (Ct. of A. D. C.), 72 Fed. (2) 67.

Assignment of interest in partnership.

Rose v. *Commissioner* (6th Circuit), 65 Fed. (2) 616.

Partnership assignment with consent of partners.

Tracy v. *Commissioner* (6th Cir.), 70 Fed. (2) 93.

Interest in a brokerage account.

Saenger v. *Commissioner* (5th Cir.), 69 Fed. (2) 631.
Swartz v. *Commissioner* (5th Cir.), 69 Fed. (2) 633.

Interest in contract to cut lumber assigned.

Second. The decision is in conflict with applicable local law of Illinois. The decree of the State court that these assignments assigned "a part of the interest of Blair in said trust estate" is the law of this case. *Freuler* v. *Helvering*, 291 U. S. 35. And the decision of the Circuit Court of Appeals is in conflict with it.

Third. The decision is in conflict with the applicable decisions of this court determining the exact property rights of a life beneficiary in a trust estate.

Brown v. *Fletcher*, 235 U. S. 589, holding an assignment by a life beneficiary of his interest was not merely an assignment of a chose in action, but was a transfer of an interest in property. This court said (pp. 597, 599):

> "The beneficiary here had an interest in and to the property that was more than a bare right and much more than a chose in action. For he had an admitted and recognized fixed right to the present enjoyment of the estate with a right to the corpus itself when he reached the age of fifty-five. His estate in the property thus in the possession of the Trustee, for his benefit, though defeasible, was alienable to the same extent as though in his own possession and passed by deed. * * * The instrument by virtue of which that alienation was evidenced,—whether called a deed, a bill of sale, or an assignment,—was not a chose in action payable to the assignee, but an evidence of the assignee's right, title and estate in and to property."

The reference in this quotation to the interest possessed by the assignor in the corpus was, of course, pertinent in

view of the fact that the assignment was of a portion of both his interest in the income and his possible interest in the view of the fact that the assignment was of a portion of both corpus. There was no question at issue as between the two.

McGuire v. *Trefry*, 253 U. S. 12.

Question of a state tax on income received by a life beneficiary from a trust, held properly taxable, and with reference to the beneficiary's right that (pp. 16, 17):

> "*It is this property right belonging to the beneficiary realized* in the shape of income, which is the subject matter of the tax under the statute of Massachusetts." (Italics ours.)

Senior v. *Braden*, 295 U. S. 422, holding a beneficiary of a trust certificate had an interest in land constituting the trust. Reaffirms *Brown* v. *Fletcher*. (See page 433, and also see discussion of Brown case, 17 Columbia Law Review, 269, 289.)

Irwin v. *Gavit*, 268 U. S. 161, holding that the interest of a life beneficiary in "the income to a fund ordinarily is treated by equity as creating an interest in the fund." (See page 167.)

Fourth. The decision is of an important question of federal law which has not been, but should be, settled by this court. This court has not had occasion to determine the question here involved with reference to assignments by beneficiaries of a trust or assignments of a similar nature. The only cases approaching it are *Lucas* v. *Earl*, 281 U. S. 111, *Poe* v. *Seaborn*, 282 U. S. 101, *Burnet* v. *Leininger*, 285 U. S. 136, and *Douglas* v. *Willcuts*, 296 U. S. 1. They do not touch this question, but leave it entirely undecided.

It is respectfully submitted that in view of the importance of this question in connection with the administration of this tax law it should be finally decided by this court.

Wherefore, it is respectfully submitted that the petition should be granted.

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APPENDIX.

Internal Revenue Act of 1924, 43 Stats. 253, Chap. 234 Mason's U. S. Code 1926, Vol. 2, p. 1875:

"SEC. 210. (a) In lieu of the tax imposed by section 210 of the Revenue Act of 1921, there shall be levied, collected, and paid for each taxable year upon the net income of every individual (except as provided in subdivision (b) of this section) a normal tax of 6 per centum of the amount of the net income in excess of the credits provided in section 216," (Here follows the rate for the normal tax, etc)

"SEC. 211. (a) In lieu of the tax imposed by section 211 of the Revenue Act of 1921, but in addition to the normal tax imposed by section 210 of this Act, there shall be levied, collected and paid for each taxable year upon the net income of every individual a surtax as follows:" (Here follows the surtax rates.)

"SEC. 212. (a) In the case of an individual the term 'net income' means the gross income as defined in section 213, less the deductions allowed by sections 214 and 206."

"SEC. 213. For the purposes of this title, except as otherwise provided in section 233—

(a) The term 'gross income' includes gains, profits, and income derived from salaries, wages, or compensation for personal service, * * * of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits, and income derived from any source whatever. * * *

(b) The term 'gross income' does not include the following items, which shall be exempt from taxation under this title: * * *

(3) The value of the property acquired by gift, be-

quest, devise, or descent (but the income from such property shall be included in gross income);"

The 1926 Act, Chap. 27, 44 Stats. 126, is practically the same, having the same paragraph numbers.

The Revenue Act of 1928, Chap. 852, 45 Stats. 795, is also practically the same in its provision, the sections being numbered 11, 12 and 22 respectively.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1936.

No. 247

EDWARD T. BLAIR,

Petitioner,

vs.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE,

Respondent.

BRIEF FOR THE PETITIONER.

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Respondent.

BRIEF FOR THE PETITIONER.

OPINIONS BELOW.

The opinion of the Board of Tax Appeals in the present case (R. 80-98) is reported in 31 B. T. A. 1192. The opinion of the United States Circuit Court of Appeals, for the Seventh Circuit, reversing the Board of Tax Appeals (R. 107) is reported in 83 Fed. (2) 655.

Jurisdiction.

Judgment of the United States Circuit Court of Appeals was rendered on the 11th of April, 1936 (R. 107-121). A petition for rehearing duly filed was denied on May 27, 1936 (R. 122). Petition for certiorari was filed in this court July 31, 1936, and that petition was allowed on October 12, 1936.

Jurisdiction of the court is invoked under Section 240 (a) of the Judicial Code as amended by an Act of February 13, 1925.

Statutes Involved.

This case involves individual income taxes for the tax years 1924, 1925, 1926 and 1929. So far as the question here presented is concerned there is no material difference between the statutes in force during the respective years, and therefore the pertinent provisions of but one of them, the 1924 statute, are set forth in the appendix attached hereto.

STATEMENT.

The question presented is whether a life beneficiary of a trust estate who has made valid assignments of portions of his interest, must pay an income tax on the trust income which has thereafter been paid, not to him, but to the assignees in accordance with the terms of the assignments.

The facts were stipulated (R. 28) and as so stipulated were included in the findings of fact entered by the Board of Tax Appeals (R. 80). We here summarize them:

William Blair, father of the petitioner, died in 1899, a resident of Cook County, Illinois, (R. 28), leaving a last will whereby he devised his residuary estate in trust for the benefit of his wife and his son, Edward T. Blair (R. 36). Edward T. Blair was also named as one of the trustees. During the life of Mrs. Blair, the wife and son were each to be paid one-half of the income (R. 33, 36, 38). Upon the death of the wife the entire income was to be paid to Edward T. Blair during his life.

Upon the death of the survivor, subject to limitations not here important, the principal of the trust was to pass to Edward T. Blair's children (R. 38).

The wife and mother, Mrs. William Blair, died in March, 1923, and Edward T. Blair became the sole beneficiary and entitled to all the income (R. 28). Immediately he assigned to his children a large proportion of the additional beneficial interest which had come to him upon his mother's death. The first of the assignments here in question was made to his daughter, Lucy Blair Linn (Ex. 2, R. 43). Other similar assignments to other of his children were made at the same time and at subsequent dates (Exs. 3 to 13, R. 44 to 53). The assignments were all in writing, signed both by Mr. Blair and his children respectively.

They were all substantially identical in form. The important parts of the first were as follows:

> "This Indenture Made * * * this 2nd day of April, A. D. 1923, by and between Edward T. Blair, party of the first part, and Lucy Blair Linn, party of the second part, WITNESSETH:
>
> That the said party of the first part, in consideration of love and affection and One Dollar ($1), * * * does hereby sell, assign, transfer and set over unto said party of the second part an interest amounting to Six Thousand Dollars ($6,000) for the remainder of the current calendar year, and Nine Thousand Dollars ($9,000) in each calendar year thereafter in the net income which the said party of the first part now is, or may hereafter be, entitled to receive during his life from the Trustees under the Will of William Blair, Deceased, late of the said City of Chicago. * * *
>
> EDWARD T. BLAIR (SEAL)
> LUCY BLAIR LINN (SEAL)"

The assignments were absolute and irrevocable.

The assignees, the children, were all residents of the State of Illinois, were all adults, and were the same persons who would be entitled to the principal of the trust, upon the death of their father, the assignor, (R. 38).

No contention has been advanced that in fact these assignments were made to meet any obligation of Mr. Blair toward his children, such as was the purpose of the assignment and trusts respectively in the cases of *Helvering* v. *Coxey,* 297 U. S. 694, *Helvering* v. *Schweitzer,* 296 U. S. 551; *Helvering* v. *Stokes,* 296 U. S. 551, and *Douglas* v. *Willcuts,* 296 U. S. 1.

The assignments were accepted by the trustees as valid, and the income so assigned was in fact paid to the assignees respectively, who in turn duly reported such income in their respective income tax returns and paid the tax thereon (R. 30).

The property right questions whether or not Edward T. Blair had an assignable interest in the trust estate, whether

or not he had assigned that interest in part by valid assignments to his children, were adjudicated by the courts of Illinois having jurisdiction over the trust estate, the trustees, the beneficiaries and the assignees. The litigation in which those property rights were adjudicated developed and terminated as follows:

The question as to the taxability of the income paid out by the trustees to the assignees by virtue of the assignments spoken of, first arose for the tax year 1923, not here involved.

The Commissioner held that the assignments, being merely of a life interest in the income of a trust, did not transfer a present interest in property or property rights, but constituted merely an assignment of future income if and as earned; therefore the income was to be regarded as belonging to the taxpayer, Edward T. Blair, and not the assignees, and accordingly was taxable to him.

Edward T. Blair appealed this question to the Board of Tax Appeals, which held that the assignments constituted transfers of a present property interest and that the income thereby produced was not taxable to him (18 B. T. A. 69).

The then Commissioner appealed that decision to the Circuit Court of Appeals, for the Seventh Circuit. There the principal question discussed was as to the *validity* of the assignments. The contention of the Commissioner was that the trust being spendthrift in nature, the life beneficiary, Edward T. Blair, did not have the power to make a valid assignment. This contention both Edward T. Blair and the Commissioner agreed, and the Circuit Court of Appeals held, basically involved the beneficiaries' and assignees' property rights which were to be determined by the law of the State of Illinois. At that time there had not been any determination of those property rights by any Illinois court, and there was no Illinois authority squarely

in point on the question. Hence the Circuit Court of Appeals itself interpreted the related decisions of the Supreme and Appellate Courts of Illinois, and held that under those decisions as so interpreted, the particular language of the will of William Blair established a spendthrift trust and deprived Edward T. Blair of any power to make a valid assignment. Hence the court decided that the assignments were invalid, and that therefore the income was taxable to Edward T. Blair (60 Fed. (2) 340).

The petition to this court for writ of certiorari having been denied (288 U. S. 602) the validity of the tax for the year 1923 was settled and the tax was paid.

However, the assignees not having been parties to that litigation were in no way bound by the judgment of the Circuit Court of Appeals. Neither were the trustees. As to both assignees and trustees it was still an open question whether under the laws of Illinois the assignments were valid or invalid. Thus the trustees were left in a position of grave doubt whether to pay the income to Edward T. Blair or to the assignees.

Accordingly the trustees, in order to secure a judgment binding on all parties on this important question, through their own independent counsel, Messrs. Cutting, Moore & Sidley, filed in the Superior Court of Cook County, Illinois, a bill in chancery asking for a construction of the provisions of the will creating the trust, and for a specific determination of the question whether the assignments were valid under the law of Illinois (R. 54-62, particularly paragraphs 12 (R. 58) and 12(d) (R. 60) of the bill).

In this bill the entire matter was laid before the Superior Court of Cook County, Illinois, including the question as it had been presented in the Circuit Court of Appeals, the judgment of that court that the assignments were invalid, and the court's opinion in that connection.

The bill particularly made reference to the opinion of the Circuit Court of Appeals and listed the authorities relied upon by the court in giving its opinion (R. 59-61).

The bill pointed out the dilemma of the trustees, namely, that they did not know whether to regard the assignments as invalid, and pay the income to Edward T. Blair, or to regard them as valid and pay the income to the assignees; and that in the face of this dilemma the trustees needed to have an authoritative judgment (Par. 12 (h), 13, etc. of the bill, R. 60, 61, 62).

Edward T. Blair, the beneficiary, the taxpayer here, filed no answer to the bill of complaint. The assignees, however, through their counsel, Wilson & McIlvaine, duly filed their answers asserting the validity of said assignments (R. 63, 66).

On the hearing which followed the Superior Court decreed that under the law of Illinois the assignments were beyond the power of Edward T. Blair to make, and were therefore invalid (R. 63-65).

The assignees appealed to the Appellate Court of Illinois, where the matter was fully presented by briefs filed and oral arguments by both sides. The position of the trustees was that the decree should be affirmed, relying particularly upon the same Illinois authorities upon which the Circuit Court of Appeals in *Commissioner* v. *Blair,* 60 Fed. (2) 340, had relied. They also relied upon the opinion of the Circuit Court of Appeals in interpreting those authorities. (See Findings of Fact, R. 87).

The Appellate Court of Illinois in a written opinion, one of the three judges dissenting, thoroughly reviewed all of the Illinois decisions on the subject, and particularly discussed and considered with all due deference the decision of the Circuit Court of Appeals in *Commissioner* v. *Blair,*

60 Fed. (2) 340, already referred to. The Appellate Court decision pointed out that the assignments were to the same persons who in all probability would receive the trust property on the event of the death of the life beneficiary, and that the effect of the assignments was merely to accelerate the gifts of the grandfather, the testator, to his grandchildren; that had the decedent intended to restrict a *voluntary* alienation by his son he could readily have accomplished it by the use of a very few words; that the absence in the will of any positive expression of a restraint on the voluntary alienation of Edward T. Blair's interest, that interest was assignable; that under the provisions of the will when construed in accordance with the law of Illinois, there was no such expression of a restraint on an assignment or voluntary alienation of that interest; that therefore the assignments were effective and valid. Accordingly it reversed and remanded the case to the Superior Court, with directions to enter a decree consistent with the opinion (R. 67; also 274 Ill. App. 23).

The Superior Court, complying with the mandate, duly entered its decree in which it found that Edward T. Blair by the instruments in writing in question assigned to his children parts of his life interest in the trust estate (R. 77, Par. 5); that the will of William Blair when properly construed did not constitute a restraint on the right of Edward T. Blair to voluntarily assign his interest, or any part thereof; that the said assignments were voluntary assignments of a part of the interest of Edward T. Blair in the trust estate and were valid; and accordingly the court decreed that the will of William Blair, when properly construed, was not a restraint on the right of Edward T. Blair to voluntarily assign his interest in said trust estate, or any part thereof, and that the assignments in question were valid (R. 78, 79).

At the time of the entry of this decree the cases involv-

ing the tax years here in question were pending before the Board of Tax Appeals and had been consolidated. And at the hearing of that consolidated case the entire record of the Illinois case was introduced in evidence, including the bill of complaint, answers, decree, opinion of the Appellate Court of Illinois, and final decree of the Superior Court. (R. 54-79.)

Thereupon the Board of Tax Appeals entered its findings of fact and opinion (R. 80) holding that the decree of the Illinois court constituted the law governing the property rights of the parties, and that the income tax question was to be determined in view of that adjudication (citing *Freuler* v. *Helvering*, 291 U. S. 35); that the assignments therefore were valid; that they constituted transfers of a present property interest in the trust estate; and that therefore the income payable and in fact paid to the assignees on account of the assigned interest was not to be taxed to the assignor, Edward T. Blair (R. 90) 31 B. T. A. 1192.

The Commissioner on his appeal to the Circuit Court of Appeals for the Seventh Circuit, maintained that the nature of the taxpayer's interest was not that of a present property right, capable of being assigned *in praesenti*, that to avoid the tax the assignor's interest must be an interest in the corpus of the trust, or in the property from which the income accrued, and that not having such an interest the assignments did not divest the assignor of the tax liability on the income assigned. (R. 113.) And the court in sustaining the Commission in this contention and reversing the Board of Tax Appeals held that while the decree of the Superior Court of Cook County, Illinois, was a binding adjudication of the property rights of the parties, the assignments as transfers of a life interest in the income of a trust were not transfers of present interests in property, but merely transfers of a future right to in-

come; and that therefore that income was taxable to Edward T. Blair (Sup. Rec. 107, 120, 121) 83 Fed. (2) 655.

It is this decision of the Circuit Court of Appeals that the petitioner asks be reversed.

Specification of Errors to Be Urged.

The Court below erred.

1. In reversing the decision of the United States Board of Tax Appeals.

2. In holding that the income in question paid from the trust estate created under the will of William Blair to the assignees named in the assignments in question was the income of the taxpayer, and therefore taxable to him.

3. In holding that Edward T. Blair did not have an interest in the trust estate created by the will of William Blair that could be transferred by him free of income tax.

SUMMARY OF THE ARGUMENT.

The interest of Edward T. Blair under his father's will was an equitable life estate in the entire corpus of the residuary trust estate.

His life estate was property. It was assignable in whole or in part.

It was in part assigned by valid assignments.

The decree of the Illinois court having jurisdiction over the subject matter and the parties, adjudicated the assignability of the interest and the validity of the assignments.

The assignments conveyed to the assignees the entire interest of the life beneficiary in the trust to the extent of the portion assigned, and divested the assignor of that interest. It was no longer his property.

Prior to the assignments the life beneficiary was the owner of the life estate, and solely because of that fact entitled to the income from it and obligated to pay the tax upon that income.

After the assignments, the assignees became substituted beneficiaries of the trust, substituted owners of the interest assigned and the income therefrom.

And just as prior to the assignments the interest of the life beneficiary carried the burden of paying the income tax, so subsequent to the assignments of that interest the tax burden passed to the assignees.

The contention advanced as an answer by the Commissioner and affirmed by the Circuit Court of Appeals is that the interest assigned was not a present property interest. But even if such a test be regarded as correct, the contention itself is wrong. For it is true as a matter of substan-

tive law that the interest of a life beneficiary in a trust estate *is a present property interest.*

Such an interest is not a mere right to receive income in the future, a mere chose in action, but is a present property right absolutely owned by the life beneficiary and assignable by him.

To effect such an assignment it is not necessary to transfer the corpus of the trust estate. An assignment of the equitable interest carries with it all that the assignor has, all that he was taxable upon prior to the assignment.

ARGUMENT.

I.

THE VALIDITY OF THE ASSIGNMENTS BY EDWARD T. BLAIR OF PORTIONS OF HIS INTEREST AS A LIFE BENEFICIARY IN THE TRUST ESTATE.

By final decree of the Superior Court of Cook County, Illinois, in the cause in which the property rights of Edward T. Blair, the original beneficiary and his assignees were properly in issue, the assignments in question were held valid. Thus there was an adjudication that the assignees were respectively the owners of the property rights in such part of the interest in the trust estate as was assigned, and that the assignor was no longer the owner.

The Commissioner has all along contended, and the taxpayer has all along agreed, that the fundamental question as to the property rights in the interest in question involving as it does a question of property rights, depends for its answer on the law of the State of Illinois. (*Blair* v. *Commissioner*, 18 B. T. A. 69; 60 Fed. (2) 340.)

Decisions of this court render any other position untenable.

Freuler v. *Helvering*, 291 U. S. 35.
Spindle, Assignee v. *Shreve*, 111 U. S. 542.
Uterhart v. *U. S.*, 240 U. S. 598.
Poe v. *Seaborn*, 282 U. S. 101.

In the case first mentioned it appears that in a controversy between the Commissioner and several life beneficiaries of a trust estate, the beneficiaries contended that they were entitled to deduct from their income an amount properly representing depreciation on the trust property.

The trust was located in California, and it was therefore admitted that the law of California would govern the rights of the beneficiaries in that regard. There being no decision at that time specifically covering the point, the Circuit Court of Appeals for the Ninth Circuit construed the law of California to the effect that the trustee was not entitled to make any such deductions from the income payable to the life beneficiaries. Accordingly, with reference to the particular tax years involved in that litigation the beneficiaries were not allowed to make the deduction, and were taxed accordingly. Subsequently the trustees filed appropriate proceedings in the California State courts to settle their accounts, and asked particularly for a construction of the will under the California law with reference to the question whether or not deductions should be made from income on account of depreciation. The California court held that under the California law such deductions were proper and that the trustees should exact from the beneficiaries a return of the amounts that had not been withheld in the past. There was no appeal from this decision. Neither the Commissioner nor the Government were parties to it. Thereafter in the cases pending before the Board of Tax Appeals between the same taxpayers and the Commissioner for subsequent years, the decree of the California court was introduced in evidence. And when the case came to this court it was held that that decree was the law of the case, and was conclusive upon the Commissioner and the courts in the tax case. And that the fact that the decree came long after the tax questions arose had no bearing on the conclusion. In this connection this court said, at page 44:

> "We understand the respondent to concede the binding force of a state statute, or a settled rule of property, followed by state courts, and as well, an antecedent order of the court having jurisdiction of the trust, pursuant to which payments were made. But, if the order of the state court does in fact govern the dis-

tribution, it is difficult to see why, whether it antedated actual payment or was subsequent to that event, it should not be effective to fix the amount of the taxable income of the beneficiaries. We think the order of the state court was the order governing the distribution within the meaning of the act.

Moreover, *the decision of that court,* until reversed or overruled, *establishes the law of California respecting distribution of the trust estate.* It is none the less a declaration of the law of the state because not based on a statute, or earlier decisions. *The rights of the beneficiaries are property rights and the court has adjudicated them.* What the law has *announced by that court adjudges distributable is, we think, to be so* considered in applying section 219 of the Revenue Act of 1921." (Italics ours.)

The court then discusses the question whether the California procedure was a collusive one and holds it was not.

To the same effect is *Hubbell* v. *Helvering,* 70 Fed. (2) 668.

But despite the fact that the Circuit Court of Appeals recognized the doctrine above set forth and stated frankly that it was bound by the decision of the Illinois State courts, it expresses some doubts and in the closing paragraph of its opinion comments in such a way as to prompt the question whether the court in fact gave the decree its full effect. We particularly refer to the following clause: "The income was not even subject to his (Mr. Edward T. Blair's) disposition until he received it. • • • While he could authorize the trustees to deliver anything that was due to him, it was not deliverable until it was *his to dispose of.*" (R. 121.) (83 Fed. (2) 662.)

For certainly that statement is directly in conflict with the decree finding that the assignments in question were of a part of Edward T. Blair's interest in the trust estate (R. 77, Par. 5); that in the trust when properly construed there was no restraint on the right of Edward T. Blair "to voluntarily assign his interest in said trust estate, or

any part thereof" (Par. First); that the assignments were "voluntary assignments of part of the interest of Edward Tyler Blair in said trust estate"; and that they "are valid." (Par. Twelfth.) (R. 78, 79.)

The assignments being valid, it is clear that the property interest of the beneficiary in the trust was thereby effectively assigned to the extent of the proportion named in each. And to the extent of the assignments, the assignees became the *substituted beneficiaries* of the trust. To the same extent Edward Tyler Blair, the assignor, ceased to be the beneficiary of the trust.

Hence the trustees were obligated to recognize that shift in the property interest and to pay the income in connection therewith to the assignees. Such interest was no longer the property of the assignor, nor was the income, but both were the property of the assignees.

II.

The Interest Assigned Was a Present Existing Property Interest in the Trust and Carried With It the Income.

The assignments being valid the next question is as to what interest was thereby assigned.

The Commissioner, invoking a high technical standard of title, maintains that the interest owned by Mr. Blair and assigned by him was not a *present property right*, capable of being assigned *in praesenti* but merely a right to *future income*, and that therefore the assignment did not divest him of the tax liability upon the income.

The Circuit Court of Appeals in order to impose the tax on the original beneficiary found it necessary to hold that the interest of Mr. Blair was not in any way attached to the corpus of the estate, but was merely a right to future income. The court's answer to the simple fact above suggested, and its judgment in that regard, bears with such importance on the basic issue before this court that we pre-

fer not to summarize it, but rather to set out in full the court's own summary of it, as follows:

> "The question is not one of the validity of the assignments but for the purpose of determining income tax liability it is one involving the date when the income became transferable. This question turns upon whether the assignor *had such an interest in the corpus of the trust as to permit of its transfer* (italics ours) or whether the assignor's interest was separate from the property and limited to the income which accrued from year to year.
>
> The latter seems to be the situation. The testator made an income provision for his son. It was in the trustees' hands beyond the reach of the son's creditors. The son could not create obligations enforceable against it. Upon the son's death the said income ceased. It passed to either his children or to the heirs of the testator or in part to the widow of the son, depending upon survivorship, etc. The income passed to them not by act of the son, but by the testamentary trust provision of the testator. *The son's interest was therefore not in any way attached to the corpus of the estate that produced the income. The income was not even subject to his disposition until he received it.* (Italics ours.) The attempted assignment to his children was in legal effect merely a direction to the trustees to pay to his children out of the income *due to him*, various specified amounts each year. It does not militate against the conclusion that the income was *his*, and was due to him. While he could authorize the trustees to deliver to another what was due to him, it was not deliverable until it was *his to dispose of.*" (R. 121.) (83 F. (2) 662.)

We submit that the rule so contended for is both highly technical and highly impracticable and leads to endless difficulties. And furthermore, it is entirely at discord with that basic conception of income taxes referred to by this court in the case of

Corliss v. *Bowers*, 281 U. S. 376,

where it was said (p. 378):

> "But taxation is not so much concerned with the re-

> finements of title as it is with actual command over the property taxed—the actual benefit for which the tax is paid. * * * The income that is subject to a man's unfettered command and that he is free to enjoy at his own option may be taxed to him as his income, whether he sees fit to enjoy it or not."

Or as was said in the case of *Freuler* v. *Helvering,* 291 U. S. 35, 49, cited above

> "The law of taxation is more concerned with the substance of economic opportunity than with classifying legal concepts, and tagging them with names and labels. *Burnet* v. *Harmel,* 287 U. S. 103."

See also

Burnet v. *Guggenheim,* 288 U. S. 280, 283.

But the income that was paid subsequent to the date of the assignments by Edward T. Blair was not subject to his command in any way. He retained no power of revoking the assignments in whole or in part, as was done in the case of *Corliss* v. *Bowers,* 281 U. S. 376, above cited. He had completely parted with all interest in it. It was to him of no economic opportunity or benefit.

But even accepting the highly technical test suggested by the Commissioner and sustained by the Circuit Court of Appeals for determination of the question here involved, the proposition itself is in direct conflict with the settled principles of substantive law. For it is not correct to say that the interest of the life beneficiary, is in no way attached to the corpus of the estate that produced the income. It is not correct to say that such a life beneficiary has not a present property interest capable of being assigned. On the contrary it is a principle of substantive law that has been declared repeatedly by this court and courts of Illinois, where the trusts were created, by courts of other states, and by text writers, that the interest of a life beneficiary is an interest in the property of the trust and therefore is attached to the corpus itself; that it is not merely a chose in

action, a right to some future income, but is a present property right belonging to the life beneficiary; that that property right is capable of assignment as such; that when assigned such interest is not a chose in action for some future income; that it is an evidence of the assignees' right, title and estate in and to the property. This court has repeatedly so held.

THE DECISIONS OF THIS COURT ON THE SUBJECT.

The case of *Irwin* v. *Gavit,* 268 U. S. 161, is particularly apt with reference to these principles. In that case the taxpayer was taxed by the Commissioner on income that he had received as a life beneficiary of a trust which was created by the will of his wife's father. If this money received from the trust by Gavit was to be regarded in and of itself as a bequest under the will, then it would be merely a bequest payable in the future, in which case it would be principal and not be taxable to Gavit. If on the other hand the bequest was to be regarded as an interest in the trust estate, and the amounts paid to him to be income from that interest, then those amounts would be taxable to him as income. In this court Gavit contended that the payments received by him were nothing more than installment payments of a bequest, and that the fact that the installments were paid out of the increase from the corpus, leaving the corpus intact, made no difference. (See page 104.)

On the other hand, the Government maintained through the Solicitor General that (see 268 U. S. page 162):

> "What Gavit in fact took under Brady's will was a vested beneficial interest in the trust estate, enforceable in a court of equity, and which consisted of the right to receive, under certain conditions, a portion of the income. On this interest or use there was no tax because he received it as a bequest. On the other hand, what income Gavit received from the trustees of the estate was taxable. Gavit's interest in the trust fund

> was 'property' the 'value' of which is exempt from tax as income because received as a bequest. * * * The fact that the enjoyment is uncertain never interferes with the vesting of an estate. When the contingency is not in the person, but in the event when enjoyment shall commence, or in the time of the enjoyment, the interest is considered vested."

The Solicitor General goes on to argue that earnings from capital constitute income, while a bequest of capital in bulk, or in installments over the years, is not income and then adds (162):

> "Here not a portion of the capital assets forming the corpus, but certain of the earnings thereof passed to the *cestui que trust.* The *cestui que trust* has an interest in the corpus because he is legally entitled to receive whatever income is given him and must have the right to enforce payment if it is wrongfully withheld. The act of 1913 specifically taxes income 'growing out of the ownership or use of or interest in real or personal property.' Therefore, it must inevitably follow that, as Gavit had an 'interest in' the corpus, the proceeds thereof coming into his hands were taxable income. In denying that the *cestui que trust* had any interest in the principal the lower courts ignored the law of the State of New York as to trust estates."

And we state thus fully the contention of the Government in the *Gavit* case as it is exactly the contention that we are making here, and it is exactly the opposite of the contention that the Government made in the court below and we assume will make here.

In its decision of the case this court held that the bequest was the corpus of the trust estate, and that what had been received by Gavit as a life beneficiary in the proceeds of that bequest was income and taxable to him. Then with reference to the holding of the lower courts that Gavit had received no interest in the corpus, this court said, at page 167:

> "We do not regard those considerations as conclusive, as we have said, but if it were material *a gift of the income of a fund ordinarily is treated by equity as*

creating an interest in the fund. Apart from technicalities we can perceive no distinction relevant to the question before us between a gift of the fund for life and a gift of the income from it. The fund is appropriated to the production of the same result whichever form the gift takes. Neither are we troubled by the question where to draw the line. That is the question in pretty much everything worth arguing in the law." (Italics ours.)

And it is to be particularly noted that in the Gavit case the life beneficiary under no circumstances whatsoever was to receive any part of the remainder of the corpus of the trust estate when the trust terminated. That passed to others. (See page 166.)

Here there is a clear recognition by this court of this principle of substantive law that the interest of a life beneficiary is an actual present interest in the corpus of the trust fund.

On the authority of this decision Edward T. Blair was liable for the tax on the income he received from the trustees *prior to the assignments.* By the same reasoning he should not be liable for the taxes on the income which *subsequent to the assignments* he did not receive at all, but the assignees did receive from the trustees. For of course it has never been contended by the Commissioner that both the original life beneficiary and the assignees are liable for the tax. If the assignor is to be held liable then consider the anomaly in view of the reasoning of the Gavit case: In the case of a life beneficiary of a trust, it is the law that he has received something, a property interest, the income from which is to be charged as taxable to him. While if the Commissioner is right, then the person to whom the life beneficiary has assigned that very same interest receives no such interest, the income from which is to be chargeable to him. We submit the two positions are inconsistent and lead to an anomalous and most impractical situation.

We also desire to call particular attention to the case of *Brown* v. *Fletcher,* 235 U. S. 589 wherein this court held that the interest of a life beneficiary in a trust was not merely a chose in action, but an actual present property interest in the corpus of the trust.

Both the facts and the pronouncements of the court are of prime importance in this connection.

In that case Conrad Baker, son of the testator who created the trust, had a life interest in the income and, if he lived to be 55, would take a large portion of the remainder of the corpus. He assigned his interest in part to secure certain notes of his. When they were not paid the interest was foreclosed and acquired by the holders of the notes. These holders were residents of Philadelphia. The trustee and the beneficiary were both residents of New York. The holders of the notes as assignees of the interest brought suit in the United States District Court in New York. They were immediately met with a defense that that court did not have jurisdiction in view of Section 24 of the Judicial Code, which precluded a suit "to recover upon any promissory note or other chose in action in favor of any assignee * * * unless such suit might have been prosecuted in such court if no assignment had been made"; and that as the life beneficiary and the trustee were residents of New York the life beneficiary could not have brought suit, and his assignee could not and hence the court had no jurisdiction.

This Court reviews the decisions construing the Act and shows that if the suit were brought upon the assignment and the assignment was a mere chose in action, then the court would not have jurisdiction, but if the suit were to recover an existing present property right that had been assigned, then the Act would not apply and the court would have jurisdiction. (See page 596.)

Therefore, the sole question presented was whether, as the court notes, page 597,

> "these proceedings by Bill in Equity are suits by assignees on a chose in action; or, suits for the recovery of an *interest in property by the transferee or assignee.*" (Italics ours.)

This court then held that the interest of the beneficiary of the trust was not a mere chose in action, but was an interest in and to the property. This court said (page 599):

> "The beneficiary here had an interest in and to the property that was more than a bare right, and much more than a chose in action. For he had an admitted and recognized fixed right to the present enjoyment of the estate with a right to the corpus itself when he reached the age of fifty-five. His estate in the property thus in the possession of the Trustee, for his benefit, though defeasible, was alienable to the same extent as though in his own possession and passed by deed. * * * The instrument by virtue of which that alienation was evidenced,—whether called a deed, a bill of sale, or an assignment,—was not a chose in action payable to the assignee, but an evidence of the assignee's right, title and estate in and to property."

It is true that in the *Brown* case it so happens that the life beneficiary also would take, if he lived long enough, the remainder interest. But that is not a factor in determining what his interest is from the standpoint of the income, as his interest in the remainder might have been defeated completely by his prior death. (See page 590.) And there is no case to be found making any such distinction.

The principle was again reaffirmed in the case of *McGuire* v. *Trefry*, 253 U. S. 12.

Here Massachusetts had levied an income tax on a resident of Massachusetts for income received from the Girard Trust Company of Philadelphia, being interest paid on several corporate bonds held by the trustee in Philadelphia. The trust was administered under the laws of Pennsylvania. The Court holds that the taxpayer had an interest

in the trust estate, realized in the shape of income which could be taxed in Massachusetts, and in part said (pp. 16-17):

> "It is true that the legal title of the property is held by the trustee in Pennsylvania. But it is so held for the benefit of the beneficiary of the trust, and such beneficiary has an *equitable right, title and interest distinct from its legal ownership.* 'The legal owner holds the direct and absolute dominion over the property in the view of the law; but the income, profits, or benefits thereof in his hands, belong wholly, or in part, to others.' 2 Story's Equity, 11th ed. sec. 964. *It is this property right belonging to the beneficiary, realized* in the shape of income, which is the subject-matter of the tax under the statute of Massachusetts."

In a most recent case of *Senior* v. *Braden* (1935), 295 U. S. 422, this Court reannounced the same basic principle. There the question involved was as to the nature of certain trust certificates issued by a so-called Massachusetts trust on land in Chicago and other States and held by a resident of Ohio. The question was whether they could be taxed in Ohio. This court held that the trust certificates were interest in the land that constituted the trust fund; that the beneficiary holding them had an interest in the trust fund itself, and that therefore they were not subject to tax in Ohio.

This court in its opinion quoted at length from the case of *Brown* v. *Fletcher,* 235 U. S. 589, above cited, including the parts which we have quoted, and then said (page 433):

> "The doctrine of *Brown* v. *Fletcher* is adequately supported by courts and writers. *Narragansett Mutual Fire Ins. Co.* v. *Burnham,* 51 R. I. 371, 154 Atl. 909; *Bates* v. *Decree of Court,* 131 Me. 176, 160 Atl. 22; Bogert, Handbook of the Law of Trusts, 430; 3 Pomeroy Equity Jurisprudence, Fourth Edition, 1928, Sec. 975, p. 2117; 17 Columbia Law Review, 269, 289. We find no reason for departing from it."

Croxall v. *Shererd,* 5 Wall. 268, 72 U. S. 268.

In this case this court had occasion to consider very fully just what interest a life beneficiary had in a trust estate, and in summing up the situation it was said, at page 281:

> "In the consideration of a court of equity, the *cestui que trust* is actually seized of the freehold. He may alien it, and any legal conveyance by him will have the same operation in equity upon the trust, as it would have had at law upon the legal estate.
>
> The trust like the legal estate is descendible, devisable, alienable and barrable by the act of the parties, and by matter of record. Generally, whatever is true at law of the legal estate, is true in equity of the trust estate." Citing many English equity cases.

SOME DECISIONS OF ILLINOIS AND OTHER STATES.

Merchants Loan & Trust Company v. *Patterson,* 308 Ill. 519. In that case Patterson joined with three others in transferring to a trustee certain properties that they owned jointly. The income was to be paid out as directed partly in the instrument itself and partly by joint orders later to be given by the grantors. This instrument was dated December 20, 1897, and it was provided that the trust was to terminate May 1, 1917, at which time the interests were to be conveyed back to the grantors. (See page 522.) In the case of the death of any one of them, before that time the share of the income that he would have been entitled to, and the share of the corpus, were to be conveyed at the proper time to such person as might be designated in the will of the decedent. (See page 524.) Some three years prior to the termination date Patterson deeded his interest in the same property to his wife, subject to the trust of 1897. Patterson subsequently died before the termination of the trust, and the question was as to just what his interest in the property had been, and whether it had been conveyed.

The Supreme Court of Illinois held that that interest was an equitable one in the property of the trust and says (pp. 530, 531):

> "It is a fundamental proposition that equitable estates are governed by the same rule as legal estates, *otherwise inextricable confusion would ensue.* (Ibid. sec. 357.) *In the consideration of a court of equity the cestui que trust is actually seized of the freehold. He may alien it, and any legal conveyance by him will have the same operation in equity upon the trust estate as it would have had at law upon the legal estate. Croxall's Lessee* v. *Shererd,* 5 Wall. 268." (Italics ours.)

In the case of *Nave* v. *Bailey,* 329 Ill. 235, the court in discussing a trust created by deed, said, page 244:

> "It is a fundamental proposition that equitable estates are governed by the same rules as legal estates. (*People* v. *Emery,* 314 Ill. 220; *Merchants' Loan and Trust Co.* v. *Patterson,* 308 id. 519; *McFall* v. *Kirkpatrick,* 236 id. 281.) Any legal conveyance by the *cestui que trust* will have the same operation in equity upon the trust estate as it would have had in law upon the legal estate. (*Merchants' Loan and Trust Co.* v. *Patterson, supra; Croxall's Lessee* v. *Shererd,* 5 Wall. 268; Washburn on Real Prop.—6th ed.—1441.)"

THE TEXT WRITERS ASSERT THE SAME PRINCIPLES.

In view of the basic holding of the Circuit Court of Appeals in this case, as quoted above, that the interest of Edward T. Blair was in no way attached to the corpus of the estate, and that he had not such an interest in the corpus as to permit of its transfer (R. 121), we desire to call this court's attention to the very clear statements to the contrary by text writers on the subject. It is, of course, clear that the interest of Edward T. Blair as a life beneficiary in the trust was an equitable life interest. This is too well settled to need citation of authorities. The following quotations from the text writers are advanced to show it is equally clear that such an equitable interest is in fact

a property interest attached to the corpus of the trust estate, and that the Circuit Court of Appeals' basic contention that it is in no way attached to the corpus of the estate is fundamentally wrong.

This court in the case of *Senior* v. *Braden*, above cited (295 U. S. 422) referred to an article in 17 Columbia Law Review. That article as a commentary by Mr. A. W. Scott of the Harvard Law School on the question involved, as decided by *Brown* v. *Fletcher*, 239 U. S. 589, above cited, and is a comprehensive review of all of the cases and text writers, and the author in his summary says, at page 289:

> "It has been shown that the rights of the *cestui que trust* in respect to their duration, transmission and alienation are treated like property rights rather than like obligations. * * *"

We refer the court to this article as a most complete and scholarly discussion of the proposition involved.

The reference to Pomeroy's text is also most apt.

> 3 Pomeroy's Equity Jurisprudence, 4th Ed., par. 975, page 2117:

There the author says in part:

> "In contemplation of courts of equity, equitable estates, according to their various degrees, are as truly property or ownership as legal estates are property in contemplation of courts of law. In fact the entire dealing of equity with the subject of equitable estates * * * are based upon the notion that equitable estates are in the truest sense property, and not mere rights of action,—not mere rights to obtain certain equitable remedies. * * * In short, the equitable estate is often regarded by a court of equity as the real, beneficial, substantial ownership, while the corresponding legal estate as a mere form and shadow."

Perry, in the 7th Edition of his work on Trusts, in speaking of the properties of a trust estate says, page 559:

> "And as the trustee may in a court of law, as a general rule, deal with the legal estate in his hands, as if he was the absolute owner, so the *cestui que trust* in a

court of equity may deal with the equitable estate in him; he is the beneficial and substantial owner, and in the absence of any disability, that is, if he is *sui juris*,— he may sell and dispose of it; and any legal conveyance of it will have in equity the same operation upon the equitable estate as a similar conveyance of the legal estate would have at law upon the legal estate."

Bogert in his Work on Trusts and Trustees (1935), Vol. 1, section 183, discusses the particular interest of a *cestui qui trust* and whether it is an interest *in personam* or *in rem*. The author reviews all the authorities and points out that one of the reasons for the *in rem* concept is that

"the *cestui's* power of alienation show him to be an owner of the *res*."

And then after citing as a leading case the decision of *Brown* v. *Fletcher*, 235 U. S. 589, the law is summarized as follows:

"The situation would seem to be summarized by the statement that, while the right of *cestui que trust* was originally purely *in personam* against the trustee, it has become increasingly a right *in rem* and is now substantially equivalent to equitable ownership of the trust *res*. The *cestui que trust*, of course, also has rights *in personam* against the trustee."

In the American Law Institute Restatement of the Law of Trusts, a beneficiary's in interest is defined as follows:

"SEC. 130. The Nature of the Beneficiary's Interest.

Except as stated in section 131,

(a) if the trust property is personal property, the interest of the beneficiary is personal property;

(b) if the trust property is real property, the interest of the beneficiary is real property unless the interest of the beneficiary is so limited in duration that if it were a legal interest it would be personal property."

In the same Work, states with reference to the power of transfer:

"SEC. 132. Powers to Make Voluntary Transfers.

Except as stated in section 133 and sections 149-162,

the beneficiary of a trust has power to transfer his interest."

And again:

"SEC. 133. Capacity to Make or Receive a Transfer.

"The beneficiary of a trust has capacity to transfer his interest to the extent that he has capacity to transfer a similar legal interest, except so far as this principle is restricted by the rules applicable to trusts for the separate use of married women."

And also it is there declared that such an interest can be the subject of a trust, the author saying:

"If the beneficiary of a trust can transfer his interest (see Sec. 132) he can create a trust of his interest, either by transferring it in trust or by declaring himself trustee of it." Sec. 83.

All of which we cite as showing how firmly fixed in the law is the proposition that a life beneficiary's equitable interest in a trust is a present property interest and treated as such for all purposes.

Decisions from Other Circuit Courts of Appeals Holding That Income Paid to Assignees of a Life Beneficiary Is to Be Taxed to the Assignees and Not the Original Beneficiary.

In our petition for certiorari we referred to the following cases as being in conflict with the decisions of the Seventh Circuit in this case. We respectfully submit that they correctly determine this question:

Commissioner v. *Field,* (2nd. Cir.) 42 Fed. (2) 820.

There the court had before it the exact question here involved, namely, whether Marshall Field, III, the life beneficiary of a trust created under the will of his grandfather, should pay the income tax on such income as was paid to his wife pursuant to an assignment by him of a part of the interest to her.

The court found that (p. 821):

> "Marshall executed a deed to his wife *assigning* to her a two-thirds interest *'in all the income of the two-fifths* of the residuary estate of Marshall Field, deceased, * * * intending hereby to convey to and vest in' his wife 'an undivided two-thirds interest in all the net income adjudicated to belong to' him by the Illinois decree." (Italics ours.)

The court held that this assignment transferred a part of the equitable interest of Marshall Field to his wife by the law of Illinois, and that the income from the interest so assigned was not income of Marshall Field and therefore he could not be taxed on it.

The court said in part (page 822):

> "So far as we know, it is universally true that the law considers an *equitable interest for life or for a term of years as present property*, alienable like any other (*Brandon* v. *Robinson*, 18 Ves. 429; *Younghusband* v. *Gisborne*, 1 Collier 400; *Snowden* v. *Dale*, 6 Sim. 524; *Bronson* v. *Thompson*, 77 Conn. 214, 58 A. 692), at least when there is no restraint on alienation (*Nichols* v. *Eaton*, 91 U. S. 716, 23 L. Ed. 254.) The law of Illinois is the same. *Binns* v. *LaForge*, 191 Ill. 598, 61 N. E. 382. In *Irwin* v. *Gavit*, 268 U. S. 161, 45 S. Ct. 475, 69 L. Ed. 897, a series of payments of income was treated as integrated into an existing interest, and for that reason alone the payments were income. No doubt the difference is conventional; there is no inherent reason why other series of future installments should not be regarded as constituting a single right, as is an annuity or the reversion upon a sublease. Some are, some are not; the distinction is historical, not rational. The interest, as adjudicated by the decree, was of a well-known kind, and it was single; in consequence it was presently assignable like a bond or building, and this is equally true though the contingent remainders remained, since Marshall is still alive." (Italics ours.)

Counsel for the Commissioner sought to distinguish this case from the case at bar on the ground that in the Marshall Field case the assignor had a possible interest in the corpus

of the estate, provided he lived to be 50 years of age. But this, we submit, is a distinction without a difference in principle. No cases have been cited by counsel for the Commissioner in support of this distinction, and we have been able to find none. On the contrary, the general principle has been applied in a number of cases where the assignor, the life beneficiary, was only such and would never under any circumstances receive the principal absolutely.

This principle was reasserted by the same Circuit in *Lowery* v. *Helvering,* (Second Circuit) 70 Fed. (2) 713. By will a decedent left to his wife during the term of her life the possession, management and control and the rents and income of his property. At her death the remainder was to go to trustees in trust for his children. The wife assigned to her children the income to which she was entitled, but not the possession, management and control. The Commissioner, the Board of Tax Appeals affirming, taxed the income to the wife, the assignor. The Circuit Court of Appeals, applying the Field case, held that the assignment was a valid assignment of a property interest and the income was not taxable to the assignor. It is to be noted that the assignor had no interest in the corpus other than as trustee, and that the assignment did not convey that interest.

With reference to the character of the interest of the assignor Mr. Justice Hand states in his opinion (p. 714):

> "In England for over a century the bare gift of the income of property has ordinarily passed the 'general property' to the donee; not only is it not necessary to transfer the corpus, but, in the absence of limitation, the gift is not limited to the donee's life."

The court further points out that the gift merely accelerated the enjoyment of the assignees of the income just as it does here. (See page 715 of the opinion.)

Shanley v. *Bowers,* 81 Fed. (2) 13 (Second Circuit). Here

there was a trust created by will for the benefit of the testator's son. He was to receive a portion of the income and upon the death or remarriage of his mother one-half of the corpus. He assigned his entire interest in trust, stipulating that a portion of the income was to be paid to his wife, and that the balance of the income and eventually all of the principal was to be paid to his creditors. The court holds that the income so assigned was not to be taxed to the assignor, as it was a valid assignment of a property interest.

The court says (p. 15):

> "The settlor's (assignor's) interest in the trust set up by the will of his father was certainly a transferable property interest, and the income collected by the transferee was in no degree dependent upon continued activities of the transferor. This Court has already intimated that only in the latter event is an assignment of income to accrue in the future ineffective to make the income the assignee's."

Cases of This Court Cited by Counsel for the Commissioner in the Court Below.

Lucas v. *Earl,* 281 U. S. 111.

In that case the taxpayer had agreed with his wife by a written contract that all salary and attorneys' fees that *he might earn in the future* should be held by them as joint tenants with the right of survivorship. This court found that the Revenue Act specifically provides that personal earnings are income and held that the tax cannot be avoided by an anticipatory arrangement for their disposition. This court said in part (p. 114):

> "There is no doubt that the statute could tax salaries to those who earned them, and provide that the tax could not be escaped by anticipatory arrangements and contracts however skillfully devised to prevent the salary when paid from vesting even for a second in the man who earned it."

Clearly the reason for that decision is that personal earn-

ings are specifically taxed under the statute as income to the man who earned the income even though there might be an attempt to transfer them in advance.

Burnet v. *Leininger,* 285 U. S. 136.

Here, too, there was a partnership of which the assignor, one of the partners, assigned a portion of his interest in the partnership to his wife. The question was whether the income from the portion assigned should be taxed to him. The court in holding that it should be, says at page 140:

> "The mere communication of the fact that the agreement had been made was not enough. It does not appear that there was any attempt to change the ownership of the partnership assets or the control of the partnership enterprise. It was the husband's interest that was the subject of the agreement. His wife was to be an equal 'partner with him' in that interest. The business of the firm was continued as before. * * * If it be assumed that Mrs. Leininger became the beneficial owner of one-half of the income which her husband received from the firm enterprise, it is still true that he, and not she, was the member of the firm and that she had only a derivative interest."

In short the distinct holding of the court is that there was no assignment of the property interest as the other partners had something to say about that and they had not agreed.

This distinction clearly appears when we consider the case of *Poe* v. *Seaborn,* 282 U. S. 101, where there was presented to this court the question whether an individual living in the State of Washington and subject to a community property law, whereby one-half of his personal earnings belonged to his wife, should be taxed with the whole earnings or only the half which came to him. And this court held that he should be taxed with but the half, the other half being the property of his wife. Here the Community Property law effected a valid assignment of one-half of the interest, and the tax burden was held to pass with the in-

terest validly assigned. While in the other two cases the assignments were not valid or effectual so that the tax burden did not pass.

But the case at bar does not touch either of these situations. There is no question of personal earnings involved and the assignments did not need the agreement or action of any third person.

The cases of *Helvering* v. *Schweitzer,* 296 U. S. 551, *Helvering* v. *Stokes,* 296 U. S. 551, and *Douglas* v. *Willcuts,* 296 U. S. 1, may be referred to.

In the Willcuts case there was actual property assigned in order to take care of the obligation of the assignor to pay alimony. It was this fact that furnished the basic reason for the determination that the income was paid in discharge of the assignor's obligation, and therefore should be taxed to him. The same principle was applied in the Stokes and Schweitzer cases, where the assignments were for the purpose of taking care of the obligations of the assignors to support their minor children, respectively. (See also 79 Fed. (2) 256, 258, and 75 Fed. (2) 702.) There was no such obligation or undertaking in the case at bar, and hence these cases are not in point.

Cases of the Various Circuit Courts of Appeals Holding to the Same Effect with Reference to Assignments Generally.

Nelson v. *Ferguson,* 56 Fed. (2) 121 (3rd Cir.).

In this case the taxpayer, Nelson, owned certain patents which he desired to have exploited. He entered into a contract with a corporation whereby he assigned the patent to it, and it agreed to exploit the invention and pay one-third of the net profits to Nelson. Then Nelson transferred his entire interest in the profits from the contract to his wife. The question was whether the profits paid to his

wife under the assignments should be taxable to Nelson. The court held they should not be, after a thorough review of all the decisions, including the case of *Lucas* v. *Earl,* 281 U. S. 111, above referred to.

The court distinguished that case upon the fact that the assignment by Nelson was not of future salary or personal earnings but that the contract constituted a property right, and that the assignment of that property right was an assignment of a present interest in future earnings, and therefore not within the Earl case.

The court said in part (p. 124):

> "In answering these questions it must be kept in mind that the thing assigned was not Nelson's future salary or personal earnings as in the Earl case and in the later case of *Luce* v. *Burnet, Commissioner,* 55 F. (2d) 751, Court of Appeals of the District of Columbia, January 18, 1932, *things not then in existence,* 5 Corpus Juris 87, *but was an existing thing, namely, property in a contract.*
>
> The assignment being of property was therefore not merely an assignment of income when earned, though from the property assigned profits and income were expected to flow. * * *
>
> Though the future income from this property right was uncertain and contingent as to amount, the right itself, the thing assigned, was fixed and certain—not revocable as in *Corliss* v. *Bowers,* 281 U. S. 376—and was independent of any future service or any future action on the part of the assignor."

In the case of *Hall* v. *Burnet,* 54 Fed. (2) 443, the Circuit Court of Appeals for the District of Columbia had occasion to consider an assignment made by a taxpayer to his wife of an undivided interest to the extent of $33,333 in his contract with an insurance company for commissions on renewals of risks placed by him as an agent. The court held the assignment a valid conveyance of a property right carrying with it the earnings and making those earnings

the income of the transferee and not of the taxpayer. The court said the assignment was not

> "of future earnings but the transfer of a property right, and though this property right gave rise to future income, uncertain and contingent though it might be as to amount, that fact does not destroy the distinction." (Page 444.)

The court then pointed out that the contract with the insurance company gave the taxpayer a property right in the renewal premiums which was independent of any future services he might have to render, and continuing says:

> "Any uncertainty in the situation concerned *only the amount;* but the agent's rights as against the insurance company were established. When, therefore, the contract was assigned to his wife, a property right passed to her, as capable of assignment as any other sort of property. * * *" (Italics ours.)

Certiorari was denied in this case by the Supreme Court, 285 U. S. 552.

Helvering v. *Seatree* (Ct. of A. D. C.), 72 Fed. (2) 67.

A partnership was terminated by one of the partners resigning. It was agreed that his interest should be paid for by a portion of the earnings of the new partnership formed by the remaining former partners. He assigned a portion of that interest to his wife. Distributions to her in accordance with the assignment were held not taxable to him, as it was an assignment of a property right.

See also:

Rose v. *Commissioner* (6th Circuit), 65 Fed. (2) 616.

Tracy v. *Commissioner* (6th Cir.), 70 Fed. (2) 93.

Saenger v. *Commissioner* (5th Cir.), 69 Fed. (2) 631.

Swartz v. *Commissioner* (5th Cir.), 69 Fed. (2) 633.

From a consideration of these principles, so firmly supported by authority, it seems clear that the assertion that Edward T. Blair did not have a present property right in the corpus of this trust estate capable of present assignment, is in direct conflict with settled principles of substantive law.

On the contrary he had a present property interest, a life interest in the corpus of the fund entitling him to the entire income therefrom.

Edward T. Blair could have sold the interest at any time. The sale would have been held valid, and if made while income tax laws were in effect he would have been assessed with a tax on the income from the proceeds of the sale. Yet, if the Commissioner is right in his contention in this case, then Edward T. Blair would continue liable also for an income tax from year to year as long as he lived, on the income from the very interest that he had sold. This in itself should refute the contention.

Of course there is no difference between a transfer by sale and the transfer by the assignments here in question. Those assignments to his children of the proportion of the interest involved in each, were not merely directions to the trustees to pay to the children specified amounts in each year. They were definite and precise assignments of interests in the equitable life estate of their father in the corpus of the trust estate. The assignments when made were effective to pass the equitable title to all future income of the trust which should be earned during the life of the assignor. Through those assignments Edward T. Blair did no more nor less than give to his children exactly what he had received from his father. The transfer included the obligations and burdens as well as the benefits.

The income which each child received in accordance with the terms of the assignments was income to that child and taxable to the child just as the income to Gavit from an equitable estate for his life was held taxable to Gavit, in *Irwin* v. *Gavit,* 268 U. S. 161.

And on the contrary that income should not be held taxable to Edward T. Blair who thereafter did not own the interest, or the use of it. The interest was not his and the income was not his. He had irrevocably parted with it. To paraphrase the holding of this court in the case of *Corliss* v. *Bowers,* 281 U. S. 376, above cited, he then had no actual command over the property taxed; he then had no actual benefit from which the tax is paid; the income was not subject to his command; he was not free to enjoy it at his option. He had irrevocably parted with it. He should not be taxed on what is not his.

Respectfully submitted,

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APPENDIX A.

Federal Tax Statutes.

Internal Revenue Act of 1924, 43 Stats. 253, Chap. 234 Mason's U. S. Code 1926, Vol. 2, p. 1875:

"Sec. 210. (a) In lieu of the tax imposed by section 210 of the Revenue Act of 1921, there shall be levied, collected, and paid for each taxable year upon the net income of every individual (except as provided in subdivision (b) of this section) a normal tax of 6 per centum of the amount of the net income in excess of the credits provided in section 216," (Here follows the rate for the normal tax, etc.)

"Sec. 211. (a) In lieu of the tax imposed by section 211 of the Revenue Act of 1921, but in addition to the normal tax imposed by section 210 of this Act, there shall be levied, collected and paid for each taxable year upon the net income of every individual a surtax as follows:" (Here follows the surtax rates.)

"Sec. 212. (a) In the case of an individual the term 'net income' means the gross income as defined in section 213, less the deductions allowed by sections 214 and 206."

"Sec. 213. For the purposes of this title, except as otherwise provided in section 233—

(a) The term 'gross income' includes gains, profits, and income derived from salaries, wages, or compensation for personal service, * * * of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits, and income derived from any source whatever. * * *

(b) The term 'gross income' does not include the following items, which shall be exempt from taxation under this title: * * *

(3) The value of the property acquired by gift, be-

quest, devise, or descent (but the income from such property shall be included in gross income);"

The 1926 Act, Chap. 27, 44 Stats. 126, is practically the same, having the same paragraph numbers.

The Revenue Act of 1928, Chap. 852, 45 Stats. 795, is also practically the same in its provision, the sections being numbered 11, 12 and 22 respectively.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1936.

No. 247

EDWARD T. BLAIR,

Petitioner,

vs.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE,

Respondent.

REPLY BRIEF FOR THE PETITIONER.

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REPLY BRIEF FOR PETITIONER.

This reply brief is submitted because of the fact that the Government in its brief has argued for the first time in this litigation the contention of *res judicata.* Hence, that contention was not anticipated in our brief in chief and must be dealt with here.

RES JUDICATA.

(A) The contention of *res judicata* is not properly before the court.

The record will show that the contention was never at any time raised before the Board of Tax Appeals. The two consolidated proceedings were respectively filed before the Board of Tax Appeals in 1929 (R. 1) and April 2, 1932. (R. 12.) Answers were duly filed in each case, of course making no mention of *res judicata,* as the decision of

the Circuit Court of Appeals in the case for the prior year 1923 was rendered June 23, 1932 (60 Fed. (2nd) 340.) But the hearing was had more than a year later, September 5, 1933. (R. 28.)

While rule 14 of the Board requires the answer of the Commissioner to "fully and completely advise the petitioner and the Board of the nature of the defense" and to state "any facts upon which the Commissioner relies for defense," rule 17 provides for amendments at any time before conclusion of the hearing and to conform to the proof. And long prior to these dates, in March 1929 the Board itself held in *Reserve National Gas Company* v. *Commissioner,* 15 B. T. A. 951, that where a former decision of the Board is neither pleaded nor introduced in evidence and where it is asserted for the first time in a brief filed by counsel that the decision of such question is *res judicata,* the question can not be considered.

Yet the Commissioner made no amendment to his answer, did not introduce in evidence any prior judgment and made no contention whatsoever before the Board of Tax Appeals that the judgment of the Circuit Court of Appeals, or the subsequent order of the Board of Tax Appeals entered thereon, was determinative of the case before it.

Thus the record when measured by the decisions of this court recently made shows such waiver of the point as precluded it from being urged in the Circuit Court of Appeals.

In *Helvering* v. *Salvage,* 297 U. S. 106, 109, this court, with reference to a claim of estoppel against the taxpayer because of his action as to prior tax years, held that that defense had not been made before the Board of Tax Appeals and therefore could not be raised in the Circuit Court of Appeals, citing the prior case of *General Utilities and Operating Company* v. *Helvering,* 296 U. S. 200, wherein it is held that the Circuit Court of Appeals

should have overruled a certain contention made by the Commissioner, as it "was not presented to or ruled upon by the Board." (P. 206.) *Res judicata* in the sense used in the case at bar is, of course, but an estoppel by judgment and the same rule must apply.

Moreover the decree of the Superior Court of Cook County was introduced in evidence by stipulation (R. 32, P. 21, 22) subject to the Commissioner's objections as to materiality. But no objection was ever made. And obviously if the prior decision of the Circuit Court of Appeals were *res judicata,* the Superior Court decree would be inadmissible. And the failure to object was another indication of waiver of the point.

It is true that the petition for appeal from the Board of Tax Appeals to the Circuit Court of Appeals (R. 102) assigns as error that "the Board erred in not holding that the question as to whether a spendthrift trust was created was *res judicata.*" But even if that assignment were permissible in view of the fact that the question was not raised before the Board and therefore the Board could not have erred in that connection, the Government subsequently failed to argue the point in the Circuit Court of Appeals, or even present it in such a way as to call it to the court's attention. The opinion of the Circuit Court by its silence demonstrates that conclusion.

In this, counsel for the respondent, in their brief recently filed (P. 12), differ with us when they say, "The *res judicata* issue was argued in the court below, but was not ruled upon by that court." But reference to the brief of the Government filed in the Circuit Court of Appeals and certified to this court in connection with this particular point will show that there was no such argument made. A close reading of the brief fails to show in any part of it even a single use of the words "*res judicata*" or "estoppel by judgment,"

and nowhere is there an authority cited upon the proposition. In that brief the following appears:

> In "Questions Presented" (P. 2), no reference to *res judicata* directly or indirectly is made.
>
> Reference in the statement is made to the prior decision as a fact but in the "Specification of Errors to be Urged" (P. 8) no reference is made to *res judicata.* One of the specifications is that the Board erred "in not holding that the Board was bound by the decision of this court on prior appeal." (P. 9)
>
> In the "Summary of Argument" the following reference is made. "Upon a prior appeal relating to an earlier year this court held that the taxpayer was beneficiary of a spendthrift trust, without power to make assignments. That decision correctly states the Illinois law applicable to the situation and the Board of Tax Appeals erred in refusing to be guided thereby and in following the erroneous decision of the Appellate Court to the contrary. That decision is inconsistent with the decisions of the Illinois Supreme Court, and consequently is not binding on this court, particularly as the Government was not a party to the suit in the State Court."
>
> Nowhere in the brief is the point separately and specifically asserted that there was a *res judicata.*
>
> There are only two points urged in the brief: I, that "The taxpayer assigned future income and not property productive of income" (P. 10), and II, that "The trust * * * is a spendthrift trust and the taxpayer had no right to alienate his interest thereunder." (P. 19.)
>
> In discussing neither of these points did the Government refer directly or indirectly to *res judicata,* or cite any authority whatsoever to support any such contention.
>
> And with reference to the second point referred to, the Government concluded: "It is our view that the Board below erred in following the erroneous decision of the Appellate Court and also erred in not accepting as authority the ruling of this court. *Commissioner* v. *Blair, Supra,* 60 Fed. (2d) 340." We respectfully submit that the most that can be said for this language is that it raises the contention that the original decision of the Circuit Court of Appeals is an authority, just as is contended in the present brief of the Government at

page 26 where they speak of that decision "as a square authority to that effect" (the spendthrift trust contention). (P. 21.)

The issue not having been argued before the court below, was waived and is not open for review at this time. See *United States* v. *Mitchell,* 271 U. S. 9, 14; *Webster* v. *Fall,* 266 U. S. 507, 511; 3 American Juris Prudence, P. 334, Par. 774; P. 335, Par. 775, 776; *Southeastern Express* v. *Robertson,* 264 U. S. 541, 542; *Donnelly* v. *United States,* 276 U. S. 505, 511.

(B) But we stand not only on the proposition that *res judicata* was not raised in the court below and in the Board of Tax Appeals, but also on the proposition that the doctrine itself does not apply in this case.

The Tait case (*Tait* v. *Western Maryland,* 289 U. S. 620) cited by the Government to support its proposition at once states the rule and the limitation which takes this case outside of the doctrine. In that case, as in the case at bar, the contention was with reference to the effect of a judgment as to a prior tax year upon a subsequent tax year before the court, and this court said (P. 623):

> "The scope of the estoppel of a judgment depends upon whether the question arises in a subsequent action between the same parties upon the same claim or demand or upon a different claim or demand. In the former case a judgment upon the merits is an absolute bar to the subsequent action. *In the latter the inquiry is whether the point or question to be determined in the later action is the same as that litigated and determined in the original action.*" (Emphasis ours.)

But it was undisputable in that regard that the facts in the prior case were the same as those in the subsequent case and were so found by the District Court (P. 622) as well as by the Circuit Court of Appeals—this court saying (P. 626):

> "But the Circuit Court of Appeals has found that all of the facts stipulated in the present cause were before it in the former one and we accept the finding."

In view of that situation this court found the doctrine of *res judicata* to apply and control the case before it.

The case of *Boal* v. *Metropolitan Museum of Art,* 19 Fed. (2d) 454 (Second Circuit) presents a situation similar to our own. In that case it appears that the will of Davis, a resident of Rhode Island, was being construed. It was contended that two clauses of the will were void. Prior decisions in connection with other phases of this estate had been handed down by this same Circuit Court of Appeals and by the First Circuit. Then in another case, connected with the construction of the will, the courts of the State of Rhode Island with the necessary parties before it held that the clauses in question were valid. This decision was pleaded in the Federal Court. The Circuit Court of Appeals holds that in the later case before it the situation was different from what it was in the first place, and that therefore the State Court decision and not its own prior decision should control. In this connection the court says (P. 459):

> "Because of the probate of the trust deed, and what has been said by the highest court of the state as the validity of its clauses, the case is different than it was when here before (298 F. 894), and also from the case presented before the First circuit in 275 F. 513. We are not now at liberty to hold that the trust deed was invalid as a testamentary disposition. It is much like a situation where a new will has been found and admitted to probate."

Certiorari denied 275 U. S. 565.

The same result was reached in the case of *Messenger* v. *Anderson,* 225 U. S. 436, where there was first a judgment of the Federal Court construing a will and then a judgment of the State Court construing the will contrariwise and this court followed the State judgment.

But in the case at bar the decision here on appeal was not upon the same facts which were before the Circuit Court

of Appeals in the prior decision. In this case there is a new and all important fact that was not before the Circuit Court of Appeals in the prior case.

In the prior case one of the issues was whether or not the trust was a spendthrift trust under which the beneficiary could not make an assignment. To determine that issue the facts before the court were two: First, the trust instrument itself, and second, the law of Illinois controlling that trust.

But at that time the law of Illinois had not been determined—there had been neither a decision of any court of competent jurisdiction with reference to the rights of the parties under the particular trust, nor was there an authoritative decision of the highest court of the state flatly deciding the point.

Therefore, the Circuit Court of Appeals was required to interpret the law of Illinois from the related decisions of the Supreme Court. And it did so, and held that that law was such as to make the trust a spendthrift trust.

But in the instant case, the same situation did not exist. There was before the Board of Tax Appeals and before the Circuit Court of Appeals the law of the case with reference to the property rights of the parties in the trust—that is, the decree of the Superior Court of Cook County, not merely the decision of the Appellate Court of Illinois, but the decree of the Superior Court of Cook County, Illinois, in a case where the court had jurisdiction over the parties and the subject matter, adjudicated just what the rights of the beneficiary and assignees were in that property.

That is the new and different fact which is in this case and which was not in the prior case, and which takes this case outside the doctrine of *res judicata*.

And the Board of Tax Appeals so held when it said with

reference to the prior decision of the Circuit Court of Appeals (R. 94):

> "that the situation is different here, there having been a subsequent decision of the Appellate Court of Illinois construing the subject matter involved."

Another view of the situation is that the decision of the Circuit Court of Appeals with reference to the trust could only be tentative and collateral so far as the property rights of the parties were concerned. It had no jurisdiction or authority to decide those property rights. And the decision, therefore, was purely for the purpose of that case. But when the judgment of the Superior Court of Cook County having real jurisdiction over the parties and the subject matter determined those property rights, the tentative judgment of the Circuit Court of Appeals, so far as subsequent litigation is concerned, had and could have no effect.

And that must be the result of the development. For here we have two judgments. One by the State Court having jurisdiction over the matter deciding the property rights one way, and the other by the Circuit Court of Appeals having jurisdiction only incidentally deciding the question the other way. If the contention of the Government is to stand, then both judgments stand and the property rights and the income flowing from those rights would belong to one group of people, the assignees, while for the balance of his life Edward T. Blair would have to pay a tax upon what is not his. And this result obviously must be avoided as it would in itself present a very serious constitutional question of its validity. *Hoeper* v. *Tax Commissioner of Wisconsin,* 284 U. S. 206.

Then too, the property right having been determined to belong to the assignees, the income would be theirs and under the case of *Irwin* v. *Gavit,* 268 U. S. 161, referred to in our brief in chief, they would have to pay the tax on that

income,. even though Edward T. Blair under force of the prior judgment would have to pay it also—if the Government is right.

Furthermore, if both judgments are to be given effect we would have the anomaly of other beneficiaries of trusts such as this and who might have assigned their interest, paying no tax, while this particular beneficiary would pay for the balance of his life.

It is no answer to argue as the Government has argued on page 19 of its brief, that the Government was not made a party to such controversy in the state courts and not even notified. There is nothing new about this situation. The courts of the states and the federal courts every day in all parts of the country consider litigated questions involving property rights, the decisions of which collaterally affect to a large extent federal tax questions.

Consider the most frequently referred to example, that of a will creating a trust giving the entire income to one beneficiary, all of which would go into the high brackets of the income tax law. Litigation develops out of the contention that the will was void on the grounds of undue influence or lack of capacity, or on the ground that it violated the rule against perpetuities, or any one of a number of other reasons. The will is set aside and the property divided among any number of people in amounts so small that either no tax is paid, or a very small tax, with the result that the Government gets far less than on the other theory. But the Government could not possibly interfere and ask that the will be sustained on the ground that that would give it a larger tax or complain of the judgment for the same reason.

Or consider a dispute between a very wealthy man usually paying income taxes in the high brackets, and a man of very modest means over the ownership of shares of stock.

The Government could not possibly be a party to the litigation and yet the outcome would directly affect the income tax that is paid on that item.

One of the best examples of the situation is found in the two cases decided by this court—the case of *Lucas* v. *Earl,* 281 U. S. 111, where an assignment by a husband to his wife of income from his law practice, was held ineffective as far as this question is concerned, and the case of *Poe* v. *Seaborn,* 282 U. S. 101 where the community property law of Wisconsin was held to accomplish the purpose in an exactly similar situation. That law was passed by the Legislature of Wisconsin without any consultation with the Government or its tax authorities, and yet it had a direct bearing on the question of taxes.

In short, the decree of the Superior Court of Cook County, Illinois, being a decree affecting property rights is good as against all parties claiming any interest not only the parties to the litigation, but all having any interest whatsoever in it. That *decree* determines the property rights of the parties and for the reasons and cases cited in our brief in chief is the law of this case.

We respectfully submit that in the light of the decisions referred to the doctrine of *res judicata* or estoppel by judgment does not apply in this case so as to make the decision of the Circuit Court of Appeals in 60 Fed. (2nd) 340 with reference to the prior tax year a binding judgment in this case with reference to the subsequent tax years.

II.

(A) At this point, the solicitors for the respondent discuss the assertion that under the Illinois law the trust is a spendthrift trust.

It is first asserted that "the judgment of the Illinois Court holding that the trust is not a spendthrift trust is not controlling in this proceeding." (See P. 13.)

Here as well as in the statement of fact, counsel for the Government prefer to regard the judgment of the *Appellate Court* of Illinois as the one being relied on as controlling. That is not our contention. Our contention is that the *law* of this case is the decree of the Superior Court of Cook County (R. 76 to 79) entered subsequent to and in accordance with the order of the Appellate Court of Cook County (R. 75) reversing the prior decree and remanding the cause with directions to enter a decree consistent with the views expressed in the opinion of the Appellate Court. (R. 74, 75.) It is that decree so entered holding the assignments valid that we contend is controlling of the property rights in this case.

To support the opposite contention the Government cites a number of cases which we respectfully submit are not applicable to the facts here. In all of such cases the inquiry was as to how far the Federal Courts were bound by *general decisions* of the state court in determining what the law of that state was. They do not involve the question of how far the Federal Courts are bound by a decree or judgment of a state court determining property rights with relation to the very subject matter before the Federal Courts.

One of the cases particularly relied on by the Government is *Barber* v. *Pittsburgh etc. Railway,* 166 U. S. 83.

That was an action of ejectment originating in the Federal Court. The rights of the parties depended upon what estate Amanda Stephens took under the will of James S. Stevenson in the property involved. Prior to the case in question another ejectment suit had been brought in the State Courts of Pennsylvania and had been finally determined in the Supreme Court of that state. In the Federal case one of the questions that finally came before this court was whether or not that decision of the Supreme Court of Pennsylvania was conclusive upon the Federal Courts. After stating the case, this court says (P. 99):

> "The decision of the Supreme Court of Pennsylvania, in the former action of ejectment, *is certainly not conclusive as an adjudication of the rights of the parties,* inasmuch as a single verdict and judgment in ejectment, not being conclusive under the laws and in the courts of the State, is not conclusive in the courts of the United States, and is no bar to a second action of ejectment." (Italics ours.)

So at the very outset it appears that the decision of the State Court was in itself not determinative of the property rights of the parties even in Pennsylvania. This court goes on to say (P. 99):

> "When the construction of certain words in deeds or wills of real estate has become a settled rule of property in a state, that construction is to be followed by the courts of the United States in determining the title to land within the State, whether between the same or between other parties."

And again on page 100:

> "But a single decision of the highest court of a State upon the construction of the words of a particular devise is not conclusive evidence of the law of the State, in a case in a court of the United States, involving the construction of the same or like words, between other parties, or even between the same parties or their privies, *unless presented under such circumstances as to be an adjudication of their rights.*" (Italics ours.)

We desire to call particular attention to this court's language "unless presented under such circumstances as to be an adjudication of their rights." For here there is no question but that with reference to the parties—the beneficiary and the assignees and trustees—having interests in the trust property, the decree of the Superior Court of Cook County, Illinois, was "an adjudication of their rights." So, far from supporting the Government's position, we submit that under the rule of this very case the decree of the Superior Court is controlling in the case at bar on this issue.

So, too, the next case cited, *Kuhn* v. *Fairmont Coal Co.*, 215 U. S. 349, does not involve this question at all. For in that case it appears that the prior judgment of the State Court was not with reference to the particular contract involved in the Federal Court case, or the rights of any of the parties who were before the Federal Court. The prior State Court judgment was merely with reference to an identical contract between other parties, so that it did not settle any property rights of the parties or in the matter involved in the Federal Court.

The case of *Lane* v. *Vick*, 3 How. 464, is another one relied on by the Government in this connection, but in that case also the same situation appeared. This court in its analysis of that case in the case of *Kuhn* v. *Fairmont Coal Co.*, 215 U. S. 349 (P. 362), points out that the construction of the will in question by the prior State Court decree was merely incidental and was not binding on any one claiming under the will.

The same is true with reference to the case of *B. & W. Taxi Company* v. *B. & Y. Taxi Company*, 276 U. S. 518, where this court reviewed all the decisions on the question. But there also the case did not involve the question here presented, as the prior decisions of the State Courts

merely held that contracts similar to the contract before this court were invalid, whereas the decisions of this court construing the common law with reference to such contracts were held valid; hence, it is clear that in that case the property rights of the parties before this court had not been adjudicated by any State Court, judgment or decree.

None of these cases gainsay to any extent the proposition laid down in the case we cited in our brief in chief, but did not quote from *Uterhart* v. *United States,* 240 U. S. 598. That case involved a question of succession taxes under a Federal statute and the question as to the amount of the tax depended for its solution upon the character of the estate taken by the taxpayer under the will of the decedent. There had been a decree entered in the New York court where the decedent had lived and the will had been probated, and this court held that the Federal Courts in determining the question before it were bound by that decree. In so holding this court stated (P. 603):

> "It is very properly admitted by the Government that the New York decree is in this proceeding binding with respect to the meaning and effect of the will. The right to succeed to the property of the decedent depends upon and is regulated by state law (*Knowlton* v. *Moore,* 178 U. S. 41, 57), and it is obvious that a judicial construction of the will by a state court of competent jurisdiction determines not only legally but practically the extent and character of the interests taken by the legatees."

This case was followed in *Sutherland* v. *Selling,* 16 Fed. (2d) 865, wherein it was held that the State Court had full and complete jurisdiction over the subject matter of the construction of the will,

> "Thus vested with jurisdiction the highest court of the State had construed the will and the laws of the State, and that construction is binding on a Federal Court sitting in the same State regardless of any question of parties or *res adjudicata.*" (P. 868.)

Also in the case of *Boal* v. *Metropolitan Museum of Art,* 19 Fed. (2d) 454, above cited, the court refers to the Uterhert case, as well as to the Kuhn and Burgess cases above referred to, and relied on by counsel for the Government and says in that connection (P. 459):

> "The rule referred to by the appellees in *Kuhn* v. *Fairmont Coal Co.,* 215 U. S. 349, 30 S. Ct. 140, 54 L. Ed. 228, and *Burgess* v. *Seligman,* 107 U. S. 20, 2 S. Ct. 10, 27 L. Ed. 359, is not applicable here, because the situation is now entirely different than that which existed at the time the federal courts first took jurisdiction, independently of the state courts. Now the principles announced in *Uterhart* v. *United States,* 240 U. S. 598, 603 * * * are applicable: * * *"

Certiorari denied 275 U. S. 565.

Hidden v. *Durey,* 34 Fed. (2d) 174, was a state tax case in which the Federal District Court of New York held that the Collector of Internal Revenue, as well as the Federal Court, was bound by the decisions "of the appropriate State Courts upon the probate of wills and their construction." (P. 178.)

In *Smith* v. *Collector of Internal Revenue,* 78 Fed. (2d) 897, which was also a tax case, it appears that a resident of Rhode Island died leaving a will which was contested. But under the law of that State the proponents and contestants of the will agreed to a compromise whereby new provisions were in effect written in the will. The question was whether the tax should be computed with reference to the will as originally drawn, or as the will was compromised and approved by the State of Rhode Island Court, and the Circuit Court of Appeals of the First Circuit, following the Uterhart case states that the Federal Courts were bound by the decree of the State Court.

Counsel for the Government seek to distinguish the case of *Freuler* v. *Helvering,* 291 U. S. 35, on the ground that the section of the Revenue Act involved provided that the

income of a trust should be taxable to the beneficiary as pursuant to the instrument or order governing the distribution, but the decision would be the same without that phraseology for the reason given by the court. (P. 45.) The decision of the California Court

> "until reversed or overruled, establishes the law of California respecting distribution of the trust estate. It is none the less a declaration of the law of the State because not based on a statute, or earlier decisions. The rights of the beneficiaries are property rights and the court has adjudicated them."

So in this case the rights of the beneficiaries and those interested in the trust property have been adjudicated and the decision is binding unless reversed. The Illinois Supreme Court has also held that a decree of *nisi prius* court with reference to the property rights of the parties in a trust is binding until set aside. *Chapman* v. *The Northern Trust Company,* 296 Ill. 353. See also *Town of Kaneville* v. *Meredith,* 361 Ill. 556.

With reference to the Superior Court decree, it is contended incidentally (P. 19, Government's brief) that there was no dispute between the parties. But the bill filed in the State Court demonstrates that the entire matter, including all of the decisions relied on by the Government, were referred to the Illinois Court; and the Board of Tax Appeals found as a fact that such was done (R. 87), that the two conflicting decisions were presented to the Appellate Court (R. 89) and that "there was no showing * * * that the proceedings in the State Court were collusive or that the decree or decision of the State Courts were entered by counsel." (P. 94.)

We submit that the decree of the Superior Court of Cook County is controlling in this case on the issue of the assignability of the beneficiary's interest and the validity of the assignments.

(B) The brief of counsel for the Government next takes up assertion that the trust in question was a spendthrift trust.

We submit that for the reasons already given that question has been disposed of by the Superior Court of Cook County in its decree.

We submit, moreover, that the decision of the Illinois Courts on this question of Illinois law was right. For there being no decision of the Supreme Court on all fours with the case being considered, the question had to be answered from an analysis of the related decisions of that court. Just as an analysis was made by the Appellate Court in this case 274 Ill. App. 23 (R. 67), when it determined that the distinction between restraints on voluntary alienation and restraints involuntary alienation, already recognized specifically by other Courts (*Ames* v. *Clarke,* 106 Mass. 573; *Boston Safety Deposit & Trust Co.* v. *Luke,* 220 Mass. 484) was also the law of Illinois. Just such an analysis was also made by an Illinois textwriter, A. M. Kales, of whom the Circuit Court of Appeals, while refusing to follow his conclusion, nevertheless said, 60 Fed. (2d) 340:

> "Indeed, Mr. Kales, a former member of the Illinois Bar, in his most excellent work on 'Estates, Future Interests, and Illegal Conditions and Restrains in Illinois,' c. 27, T. 6, is not in accord with the reasoning or the results of the Illinois cases on this subject, and he offers some very pertinent and constructive criticism."

A further analysis of these cases we submit is inappropriate in view of the decree of the Superior Court of Cook County.

III.

Under this heading counsel for the Government discuss the proposition of "the transactions were assignments of future income and not of a present interest." Counsel then gathered together most of the cases on the question and classified them with reference to factual situations. They then say at page 34, "In all these cases the courts have applied, but not always consistently, the general rule that income from personal service is taxable to the one who earns it; that income from property is taxable to the owner or to the one retaining control of the property producing the income, *and that any anticipatory arrangement designed in such case to divert income to another is in effect to divert the tax.*" (Italics ours.) This statement, we submit, is confused. It is true that income from personal service is taxable to the one who earns it, as held in the cases of *Lucas* v. *Earl*, 281 U. S. 111, *Burnet* v. *Leininger*, 285 U. S. 136, and that with reference to such income any anticipatory arrangement of assignment does not relieve the assignor of the burden of paying the taxes. But it is not true that it has been held with reference to income from property, that any anticipatory arrangement of assignment of that income does not carry with it the burden of paying the tax.

The case of *Burnet* v. *Leininger*, 285 U. S. 136, clearly falls within the first classification, as it involved personal earnings. And moreover, there was also involved a question of partnership as pointed out in our brief and as in the Lucas case. The statement in counsel's brief that the assignment in this case, as in the Leininger cases (see page 39 of the Government's brief) was "bottomed" on the fact that the income was to be petitioner's property is not correct. The income was not the petitioners and on the con-

trary the assignment was "bottomed" on the equitable life interest in the trust estate which was an assignable interest. In the Earl and Lucas cases there was no equitable interest in any property producing the income.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1936

No. 247

EDWARD T. BLAIR, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Board of Tax Appeals (R. 102) is reported in 31 B. T. A. 1192. The opinion of the Circuit Court of Appeals (R. 125) is reported in 83 F. (2d) 655.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on April 11, 1936 (R. 138). Petition for rehearing was filed May 1, 1936 (R. 138), which was denied May 27, 1936 (R. 139). Petition for certiorari was filed July 31, 1936. The jurisdiction

of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether specified amounts of income assigned by petitioner to his children, out of income payable to him under a trust created by his father's will, were taxable to petitioner or to such children.

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are set forth in the Appendix, *infra*. pp. 10–12.

STATEMENT

The facts were stipulated (R. 28–32). As found by the Board they may be summarized as follows (R. 94–101):

Petitioner and Chauncy J. Blair were named trustees of a trust created by the will of William Blair, father of the former (R. 32–41). By the will, the trustees were directed to pay deceased's wife one-half of the net income from the trust property as it arose or accrued during her lifetime, and to pay the other half to the petitioner during his lifetime. The trust provided that upon the death of the wife the whole of the net income was to be paid to petitioner during his life (R. 36). Upon the death of the survivor of the wife and petitioner (subject to limitations not here material) the principal of the trust was to pass to petitioner's children or their issue (R. 37).

The will contained the following provision (R. 94–95):

> TWENTY: I do hereby declare and direct that the income from said trust fund and estate which is herein ordered to be, from time to time as the same shall be received paid to my said wife and to my said son and to his said wife and to their children and descendants of children in the cases aforesaid shall be paid to them directly upon their separate order and receipt therefor, for their sole and separate use respectively, and that the same shall not be nor be made nor held in any manner nor by any proceedings whether in law or equity while yet in the hands of said trustees liable for or subject to the payment of any of the debts or obligations of either of the persons entitled to the same as above herein set forth.

The wife died on or about March 13, 1923. After her death petitioner executed and delivered a series of indentures to his children. Each of them provided, in substance, that petitioner, in consideration of love and affection and $1, did thereby sell, assign, transfer, and set over to said children "an interest" of specified amounts (in some instances payable annually, in others payable monthly) "in the net income which the * * * [petitioner] now is, or may hereafter be, entitled to receive during his life from the Trustees under the Will of William Blair" (R. 95–97). Each of such indentures authorized and empowered the child "either in her own name or in the name of the said party of the

first part, to receive and receipt to the Trustees" for the specified amount "in each year thereafter of the income and moneys which shall at any time become payable to" petitioner under the terms of the will of William Blair (R. 95). Each indenture also provided that all payments should be made in person to the particular child and not upon order or assignment, nor by transfer by operation of law, and were to cease upon the death of either party thereto (R. 95). The trustees, who have, since 1923, been petitioner and his son (R. 97), accepted the assignments and, during the years 1924–1926 and 1929, paid to petitioner's children the sums therein specified out of the income of the trust (R. 97).

In a prior case, which involved petitioner's income tax for the year 1923, the Court of Appeals for the Seventh Circuit held that the trust here involved was a spendthrift trust and that the petitioner lacked power to make the above assignments. *Commissioner* v. *Blair,* 60 F. (2d) 340, certiorari denied, 288 U. S. 602. After that decision the trustees (of whom petitioner is one) filed a complaint in the Superior Court of Cook County, Illinois, naming petitioner, individually, and petitioner's children as defendants, reciting the income tax question and the decision of the Circuit Court of Appeals, *supra,* and praying the court to construe the will of William Blair. The Superior Court held that the trust was a spendthrift trust and that the assignments in question were

invalid. Upon appeal the Appellate Court of Illinois, First District, reversed the lower court and held that the assignments were valid. *Blair* v. *Linn,* 274 Ill. App. 23.

In the instant case the Board held that notwithstanding the prior decision of the Circuit Court of Appeals it was bound by the decision of the Illinois court, and that under that decision the income paid to his children by the trustees was not taxable to petitioner (R. 102–108). The Circuit Court of Appeals, though not without doubt, also held itself bound by the decision of the Illinois court, but determined that the assignments were in legal effect merely a direction to pay to his children various specified amounts of the income due petitioner, which were not deliverable until it was petitioner's to dispose of, and therefore such income was taxable to him (R. 125–137).

ARGUMENT

1. Petitioner contends that the decision below, holding that trust income which he had assigned to his children was nevertheless taxable to him, is in conflict with several decisions of other circuit courts of appeals. The Government submits that the court below has correctly applied the applicable principles of law to the particular facts in this case in a way not in conflict with other decisions.

Two decisions of this Court have stated the applicable principle: a bare assignment of future in-

come, without the assignment of that which produced it, cannot operate to relieve the assignor of taxes on such income. *Lucas* v. *Earl,* 281 U. S. 111; *Burnet* v. *Leininger,* 285 U. S. 136. Obviously, under that rule, the question in the instant case is not resolved by the decision of the Illinois court that the trust here involved is not a spendthrift trust. Assuming, as did the court below, that the terms of the trust barred only involuntary transfers (See *Griswold,* Spendthrift Trusts, Secs. 358, 360 (1936)), the question remains whether the assignment made was of a character which would relieve petitioner of his tax liability.

The court below held that the opinion of the Illinois Appellate court required the conclusion that the assignments made by petitioner were not of a share in the corpus, but only of specified amounts payable out of the income as he received it. Petitioner could, in other words, deliver to the trustees a standing authorization to deliver to his children an annual, or monthly sum, but the money could not, under the terms of the trust, pass to the children until it was petitioner's to dispose of. The Illinois court stated (R. 84; 274 Ill. App. 23, 29–30):

> The words said to prohibit the assignments are, that the income should be paid to the testator's wife and to his son "directly upon their separate order and receipt therefor, for their sole and separate use * * *." * * * *The word "order"*

> *means a writing "requiring the party to whom it is addressed to deliver property of the person making the order to some one therein described."* * * * To pay the income to someone other than a beneficiary would require an order on the trustees signed by the beneficiary. *The language of the will implies the very thing that has been done by the assignments.* (Italics supplied.)

The statement, it is submitted, must be construed as a decision that petitioner has given to his children merely an order on the trustees to pay them, at stated times, specified amounts out of his income.

The cases upon which petitioner relies (Pet. 9–12) are not in conflict. In most of them, the assignment was of an interest in the property producing the income, rather than of the income itself, or, at least, was so construed by the court. *Nelson* v. *Ferguson,* 56 F. (2d) 121 (C. C. A. 3d), certiorari denied, 286 U. S. 565; *Helvering* v. *Coxey,* 79 F. (2d) 661 (C. C. A. 3d), reversed on other grounds, 297 U. S. 694; *Rose* v. *Commissioner,* 65 F. (2d) 616 (C. C. A. 6th); *Tracy* v. *Commissioner,* 70 F. (2d) 93 (C. C. A. 6th); *Hall* v. *Burnet,* 54 F. (2d) 443 (App. D. C.), certiorari denied, 285 U. S. 552; *Helvering* v. *Seatree,* 72 F. (2d) 67 (App. D. C.). See also *Copland* v. *Commissioner,* 41 F. (2d) 501 (C. C. A. 7th). In two cases cited by petitioner (Pet. 12) the income was held taxable to the assignor be-

cause no interest in the corpus had been assigned. *Saenger* v. *Commissioner,* 69 F. (2d) 631 (C. C. A. 5th); *Edward G. Swartz, Inc.* v. *Commissioner,* 69 F. (2d) 633 (C. C. A. 5th). See also *Brewster* v. *United States,* 9 F. Supp. 686 (Ct. Cl.)

The Circuit Court of Appeals for the Second Circuit has, it is true, adopted a somewhat different rationale for the decision of cases of this nature. However, the results reached in that circuit are entirely consistent with the test applied in the other circuits. In *Commissioner* v. *Field,* 42 F. (2d) 820 (C. C. A. 2d), the language of the assignment clearly indicates an intention to transfer an undivided interest in the corpus of the trust estate. Apart from the language of the assignment, it is significant that not an annual sum certain, but a stated percentage of the income, was to go to the assignee. In *Lowry* v. *Helvering,* 70 F. (2d) 713 (C. C. A. 2d), the assignment, which was of all the income from the trust, was made in New York where, as the court points out, an assignment of all of the income, without more, is effective to transfer the interest of the assignor in the corpus. See 70 F. (2d) 714. This is also the explanation of the decision in *Shanley* v. *Bowers,* 81 F. (2d) 13 (C. C. A. 2d).

2. Petitioner also alleges a conflict with certain decisions of this Court which have adjudged the rights of a life beneficiary in a trust estate (Pet. 12–13). As already pointed out, however, the de-

cision in the present case depends upon the peculiar nature of petitioner's interest, as determined by the Illinois court.

CONCLUSION

The decision of the court below correctly applies the rules laid down by this Court to the particular facts of the case. There is no conflict with other decisions. The petition should, therefore, be denied.

Respectfully submitted.

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SEPTEMBER 1936.

APPENDIX

Revenue Act of 1924, c. 234, 43 Stat. 253:

SEC. 213. For the purposes of this title, except as otherwise provided in section 233—

(a) The term "gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service * * *, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever * * *.

(b) The term "gross income" does not include the following items, which shall be exempt from taxation under this title:

* * * * *

(3) The value of property acquired by gift, bequest, devise, or descent (but the income from such property shall be included in gross income);

* * * * *

SEC. 219. (a) The tax imposed by Parts I and II of this title shall apply to the income of estates or of any kind of property held in trust, including—

* * * * *

(b) Except as otherwise provided in subdivisions (g) and (h), the tax shall be com-

puted upon the net income of the estate or trust, and shall be paid by the fiduciary. The net income of the estate or trust shall be computed in the same manner and on the same basis as provided in section 212, except that—

* * * * *

(2) There shall be allowed as an additional deduction in computing the net income of the estate or trust the amount of the income of the estate or trust for its taxable year which is to be distributed currently by the fiduciary to the beneficiaries, and the amount of the income collected by a guardian of an infant which is to be held or distributed as the court may direct, but the amount so allowed as a deduction shall be included in computing the net income of the beneficiaries whether distributed to them or not. * * *

The corresponding provisions of Section 213 (a) and (b), and Section 219 (a) and (b), of the Revenue Act of 1926 are identical with the foregoing; and the corresponding provisions of Section 22 (a) and (b) and Section 162 (b) of the Revenue Act of 1928 are substantially the same.

Treasury Regulations 65, promulgated under the Revenue Act of 1924:

ART. 73. *Gifts and bequests.*—Property received as a gift, or received under a will or under statutes of descent and distribution, is exempt from the income tax, although the income therefrom derived from investment, sale, or otherwise is not. * * *

ART. 342. *Method of computation of net income and tax.*—The statute provides that the tax computed upon the net income of the estate or trust shall be paid by the fidu-

ciary, except in the case of the trusts described in article 347. However, in computing the net income of the estate or trust, the following deductions will be allowed either in addition to, or in lieu of (as the case may be) those specified in section 214 in the case of individuals:

* * * * *

(2) The amount of the income of the estate or trust for its taxable year which is to be distributed currently by the fiduciary to the beneficiaries, and the amount of the income collected by a guardian of an infant which is to be held or distributed as the court may direct, shall be allowed as an additional deduction in computing the net income of the estate or trust. The amount so allowed as a deduction must be included by a beneficiary in computing his net income, whether distributed to him or not. If the taxable year of the beneficiary differs from that of the estate or trust, the amount which he is required to include in computing his net income shall be based upon the income of the estate or trust for its taxable year ending within his taxable year. * * *

The corresponding provisions of Articles 73 and 342 of Regulations 69, relating to the Revenue Act of 1926, are identical with the foregoing; and the corresponding provisions of Articles 83 and 862 of Regulations 74, relating to the Revenue Act of 1928, are substantially the same.

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In the Supreme Court of the United States

OCTOBER TERM, 1936

No. 247

EDWARD T. BLAIR, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the Board of Tax Appeals (R. 90–98) is reported in 31 B. T. A. 1192. The opinion of the Circuit Court of Appeals (R. 107–121) is reported in 83 F. (2d) 655.

The opinions in two earlier proceedings are also involved in the present case. These are *Commissioner* v. *Blair,* 60 F. (2d) 340 (C. C. A. 7th), certiorari denied, 288 U. S. 602, and *Blair* v. *Linn,* 274 Ill. App. 23.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered April 11, 1936 (R. 122). A petition for a rehearing was filed May 1, 1936 (R. 122), and was denied May 27, 1936 (R. 122). The petition for certiorari was filed July 31, 1936, and was granted October 12, 1936 (R. 123). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the rule of *res judicata* is applicable in this case.

2. Whether specified amounts of income which the petitioner purported to assign to his children, out of income payable to him under a trust created by his father's will, were taxable to the petitioner or to the children.

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are set forth in the Appendix (*infra,* pp. 43–46).

STATEMENT

The facts were stipulated (R. 28–79) and are not in dispute. As found by the Board (R. 80–90), they may be summarized as follows:

The petitioner and another were named trustees of a trust created by the will of William Blair, father of the petitioner (R. 33–42). By the will, the trustees were directed to pay to the deceased's

wife one-half of the net income from the trust property during her lifetime, and to pay the other half to the petitioner during his life. Upon the death of the wife, the whole of the net income was to be paid to the petitioner during his life (R. 37). After the petitioner's death, the income is to be paid to the wife or daughter-in-law of the decedent (petitioner's wife), or to the petitioner's surviving children under certain circumstances, until the youngest child reaches the age of 21. At that time the principal of the trust property is to be transferred to the petitioner's children (R. 38).

The will contained the following provision (R. 83):

> TWENTY: I do hereby declare and direct that the income from said trust fund and estate which is herein ordered to be, from time to time as the same shall be received paid to my said wife and to my said son and to his said wife and to their children and descendants of children in the cases aforesaid shall be paid to them directly upon their separate order and receipt therefor, for their sole and separate use respectively, and that the same shall not be nor be made nor held in any manner nor by any proceedings whether in law or equity while yet in the hands of said trustees liable for or subject to the payment of any of the debts or obligations of either of the persons entitled to the same as above herein set forth.

The wife died in March, 1923. After her death, the petitioner executed and delivered a series of indentures to his children. Each of these provided in substance that the petitioner, in consideration of love and affection and $1, did thereby sell, assign, transfer, and set over to said children "an interest" of specified amounts (in some instances payable annually, in others payable monthly) "in the net income which the * * * [petitioner] now is, or may hereafter be, entitled to receive during his life from the Trustees under the Will of William Blair" (R. 83–84). Each of such indentures authorized and empowered the child "either in her own name or in the name of the said party of the first part [petitioner], to receive and receipt to the Trustees" for the specified amount "in each year thereafter of the income and moneys which shall at any time become payable to" petitioner under the terms of the will of William Blair (R. 84). Each indenture also provided that all payments should be made in person to the particular child and not upon order or assignment, nor by transfer by operation of law, and the assignments were to cease upon the death of either party thereto (R. 84). The trustees, who have, since 1923, been petitioner and his son (R. 85), accepted the assignments and, during the years 1924, 1925, 1926, and 1929, paid to the petitioner's children the sums therein specified out of the income of the trust (R. 86).

In a prior case which involved the petitioner's income tax for the year 1923, the Circuit Court of Appeals for the Seventh Circuit held that the trust here involved was a spendthrift trust and that the income remained taxable to the petitioner despite the assignments. *Commissioner* v. *Blair,* 60 F. (2d) 340, certiorari denied, 288 U. S. 602. (R. 87.) After that decision the trustees (of whom the petitioner is one) filed a complaint in the Superior Court of Cook County, Illinois, naming the petitioner, individually, and the petitioner's children as defendants, reciting the income tax question and the decision of the Circuit Court of Appeals referred to above, and praying the court to construe the will of William Blair and instruct the trustees as to whom they should make payment of the income covered by the assignments. The Superior Court held that the trust was a spendthrift trust and that the assignments in question were invalid. Upon appeal, the Appellate Court of Illinois, First District, with one judge dissenting, reversed the lower court and held that the assignments were valid. *Blair* v. *Linn,* 274 Ill. App. 23. (R. 67–79.)

In the instant case the Board held that notwithstanding the prior decision of the Circuit Court of Appeals it was bound by the decision of the Illinois court, and that under that decision the income paid to the children by the trustees was not taxable to the petitioner (R. 90–98). The Circuit Court of Appeals reversed the Board and held that the assign-

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ments, though valid, were in legal effect merely a direction to pay to the children various specified amounts of the income due to the petitioner, which was not actually payable until it became due and was the petitioner's to dispose of, and that, therefore, such income remained taxable to him (R. 107–121).

SUMMARY OF ARGUMENT

I

The judgment of the Circuit Court of Appeals in *Commissioner* v. *Blair,* 60 F. (2d) 340, is conclusive in this proceeding as *res judicata.* The issue presented in the present case is the same as that already decided in the previous decision. The issue there was whether the petitioner was taxable for the income of the trust created by his father's will although he had executed assignments of that income to his children. That is the very issue now before the Court. The decision of the Illinois Appellate Court in *Blair* v. *Linn,* 274 Ill. App. 23, between different parties, cannot destroy the effect as *res judicata* of the prior decision of the Circuit Court of Appeals between the same parties who are now before the Court.

II

The trust was, under Illinois law, a spendthrift trust. Hence the income therefrom is to be taxed to the beneficiary (petitioner).

A. The judgment of the Illinois court is not controlling in this proceeding. It has long been settled that the only decisions of state courts which are conclusive upon the Federal courts are those of the highest courts of the State, interpreting State statutes or applying a settled rule of property. In the present case the state decision involved is not a decision of the highest court of the State, and it does not interpret a state statute or apply a settled rule of property.

In any event, the decision of the Illinois Appellate Court was not entered until March 31, 1934, many years after the tax years here in question. Regardless of the effect which the Illinois decree may have on payments made thereafter and pursuant to it, it should not be given a retroactive effect so as to alter the legal status of income received and payments already made.

B. The decision of the Illinois Appellate Court is not in accord with the settled law of the State. The will in question contained a comprehensive spendthrift clause which seems plainly sufficient to establish a complete spendthrift trust under the settled law of Illinois. No decision of the Illinois Supreme Court has evidenced the least requirement that any specific phraseology is essential to the creation of a spendthrift trust. Examination of the Illinois cases would seem to make it plain that it is the settled law of the highest court of that State that an instrument containing language

such as that before the Court in the present case results in the creation of a spendthrift trust,—a spendthrift trust which is a bar against voluntary alienation as well as alienation at the suit of creditors.

III

The transactions were assignments of future income and not of a present interest. The court below held that the assignments made by the petitioner were not of a share in the corpus, but only of specific amounts payable out of the income as he received it. This view is supported by the language which this Court used in *Eaton* v. *Boston Safe Deposit & Trust Co.*, 240 U. S. 427, 429, where the restriction against creditors was treated "as limiting the character of the equitable property and inherent in it." If the decision in *Blair* v. *Linn*, 274 Ill. App. 23, must be taken as controlling here, it must be construed, we submit, as a decision that the petitioner's assignments, though valid and effective, were merely orders on the trustee to pay to the children, at stated times, specific amounts out of *his* income. The petitioner's right as a beneficiary of the trust was solely to receive the income *as and when* it should be earned and become due. The income did not become the property of the children assignees except derivatvely, through him. It was his property before it was theirs, just as Earl's income in *Lucas* v. *Earl*, 281 U. S. 111, was his income, and thus taxable to him, before it became

Mrs. Earl's. The statute places the liability for the tax squarely upon the beneficiary.

The petitioner had only future income to assign. As such, the income was attributable to him, and the court below properly held it taxable to him.

ARGUMENT

I

THE JUDGMENT OF THE CIRCUIT COURT OF APPEALS IN *COMMISSIONER* v. *BLAIR*, 60 F. (2D) 340, IS CONCLUSIVE IN THIS PROCEEDING AS *RES JUDICATA*

In *Tait* v. *Western Maryland Ry. Co.*, 289 U. S. 620, this Court decided that the rule of *res judicata* is applicable in income tax cases. That rule, we submit, applies and should be conclusive here. In a prior proceeding between precisely the same parties as are now before this Court, it has been adjudicated that the trust involved in this case is a spendthrift trust, that the purported assignments of income by the beneficiary were invalid, and that the income remained taxable to the petitioner. *Commissioner* v. *Blair*, 60 F. (2d) 340 (C. C. A. 7th); certiorari denied, 288 U. S. 602.

The issue presented in the present case is the same as that already decided in the previous decision. The issue there was whether the petitioner was taxable for the income of the trust created by his father's will although he had executed assignments of that income to his children. That issue has been adjudicated against the petitioner in a previous proceeding between the very parties now

before the Court. Even conceding that the previous Circuit Court of Appeals decision was wrong, and that the decision of the Illinois Appellate Court upon which the petitioner relies shows that it was wrong, nevertheless, the issue has been adjudicated between these parties. That is the essence of *res judicata*. The issue decided in the prior judgment of the Circuit Court of Appeals was the taxability to the petitioner of the income of *this* trust. That is the very issue now before this Court. That there may be new arguments bearing on that issue is, of course, immaterial. The doctrine of *res judicata* seems plainly applicable and controlling here.

So far as the conclusive effect of the prior decision of the Circuit Court of Appeals is concerned, the decision of the Illinois Appellate Court in *Blair* v. *Linn,* 274 Ill. App. 23, seems immaterial. That court merely gave another decision on the same issue which the Circuit Court of Appeals had previously decided. Neither the United States nor the Commissioner of Internal Revenue was a party to the Illinois proceeding. Whatever may be the merits of that decision and its effect on the parties to it, it cannot destroy the effect as *res judicata* of the prior decision of the Circuit Court of Appeals between the same parties who are now before the Court.

It is true that the issue of *res judicata* was not raised by the Government in its answers before the Board of Tax Appeals. This, however, is easily

explainable. The answers were filed on February 15, 1929 (R. 12), and on May 2, 1932 (R. 27). The decision of the Circuit Court of Appeals in *Commissioner* v. *Blair,* 60 F. (2d) 340, was not entered until June 23, 1932, and this Court's denial of certiorari in that case did not occur until February 6, 1933. In other words, the decision upon which the claim of *res judicata* is based was not made until after the Commissioner's answers had been filed with the Board of Tax Appeals. It would doubtless have been better practice to have filed amended answers before the Board. As a matter of fact, neither the taxpayer nor the Government amended its pleadings in any way. The taxpayer's pleadings, for instance, make no reference to the Appellate Court decision entered in 1934.[1] The whole matter was presented to the Board in a somewhat informal way through a Stipulation of Facts (R. 28–79). The Board accepted the case on this basis. However, the Board was not unaware of the prior decision of the Circuit Court of Appeals. It appeared in exhibits which were admitted in evidence (R. 59, 68, 77), it was referred to in the Board's findings of fact (R. 87, 89), and was discussed at great length in the Board's opinion (R. 91, 94). Hence the cases of *United States* v. *Bliss,* 172 U. S.

[1] The decree of the Illinois Appellate Court was not entered until March 5, 1934 (R. 74), and the final decree of the Superior Court of Cook County, in pursuance of the Appellate Court's decision, was entered on March 31, 1934 (R. 76–79).

321, and *Southern Pacific Railroad* v. *United States,* 168 U. S. 1, which dealt with situations in which the decision relied upon was neither pleaded nor in any other way brought to the attention of the court below, are not in point here.

After the taxpayer prevailed before the Board, the Government sought review in the Circuit Court of Appeals. The Government raised the issue of *res judicata* both in its petition for review and in its brief before the Circuit Court of Appeals. The fact of the decision in *Commissioner* v. *Blair,* 60 F. (2d) 340, certiorari denied, 288 U. S. 602, is alleged in the petition for review (R. 101). The fifth and sixth assignments of error in the petition for review were as follows (R. 102):

> 5. The Board erred in holding that it was not required to follow the decision of the Seventh Circuit Court of Appeals in *Commissioner* v. *Blair,* 60 Fed. (2d) 340.
>
> 6. The Board erred in not holding that the question as to whether a spendthrift trust was created was *res adjudicata.*

The *res judicata* issue was argued before the court below, but was not ruled upon by that court.

We submit, therefore, that the rule of *res judicata* is controlling in this case. If this contention is correct it is not necessary to consider the other points raised in this brief.

II

THE TRUST WAS, UNDER ILLINOIS LAW, A SPENDTHRIFT TRUST. HENCE, THE INCOME THEREFROM IS TAXABLE TO THE BENEFICIARY (PETITIONER)

A. THE JUDGMENT OF THE ILLINOIS COURT HOLDING THAT THE TRUST IS NOT A SPENDTHRIFT TRUST, IS NOT CONTROLLING IN THIS PROCEEDING

The petitioner's argument is grounded upon the effect which he contends must be given to the judgment of the Appellate Court of Illinois, entered on March 31, 1934. In the absence of that decision it is clear that the petitioner could not prevail, since the very point was decided against him in *Commissioner* v. *Blair,* 60 F. (2d) 340 (C. C. A. 7th), certiorari denied, 288 U. S. 602.

In considering the effect of the Illinois Appellate Court's decree it must be conceded, of course, that the decree is not binding here on the basis of *res judicata,* since the United States was not and could not have been a party to the proceeding in which it was entered. The question, then, is the possible effect of the subsequent decision of the Illinois Appellate Court.

It has long been settled that the only decisions of state courts which are conclusive upon the Federal courts are those of the highest court of the State interpreting state statutes or applying a settled rule of property. *Irving National Bank* v. *Law,* 9 F. (2d) 536, 537 (C. C. A. 2d); *Westerlund* v. *Black Bear Mining Co.,* 203 Fed. 599, 609 (C. C. A. 8th); *United States Tel. Co.* v. *Central*

Union Tel. Co., 202 Fed. 66, 69 (C. C. A. 6th); *Anglo-American Co.* v. *Lombard,* 132 Fed. 721, 742 (C. C. A. 8th), certiorari denied, 196 U. S. 638. See *Louisville & Nashville R. R. Co.* v. *Garrett,* 231 U. S. 298, 305; *Clarke* v. *Clarke,* 478 U. S. 186, 192; *Pelton* v. *National Bank,* 101 U. S. 143, 144. *Cf. Erie R. R. Co.* v. *Hilt,* 247 U. S. 97; *Ankeney* v. *Hannon,* 147 U. S. 118, 126.

In the present case, the state decision involved is not a decision of the highest court of the State, and it does not interpret a state statute or apply a settled rule of property.

This Court long ago decided that in such a case it is not concluded in the determination of questions presented to it by a state court decision. In *Lane* v. *Vick,* 3 How. 463, the Court construed a will for itself in determining the rights of beneficiaries, although the state court in another proceeding had adopted a different construction. This Court said (p. 476):

> With the greatest respect, it may be proper to say, that this court do not follow the state courts in their construction of a will or any other instrument, as they do in the construction of statutes.
>
> Where, as in the case of *Jackson* v. *Chew,* 12 Wheat., 167, the construction of a will had been settled by the highest courts of the state, and had long been acquiesced in as a rule of property, this court would follow it, because it had become a rule of property.

> The construction of a statute by the Supreme Court of a state is followed, without reference to the interests it may affect, or the parties to the suit in which its construction was involved. *But the mere construction of a will by a state court does not, as the construction of a statute of the state, constitute a rule of decision, for the courts of the United States.* [Italics ours.]

The rules thus announced were approved and applied in many cases, including *Oates* v. *National Bank,* 100 U. S. 239, 246; *Railroad Co.* v. *National Bank,* 102 U. S. 14, 29, 55; *Burgess* v. *Seligman,* 107 U. S. 20, 33–34; and in *Bucher* v. *Cheshire Railroad Co.,* 125 U. S. 555. In *Barber* v. *Pittsburgh, Fort Wayne and Chicago Ry. Co.,* 166 U. S. 83, the controversy related to the construction of a will which had previously been interpreted by the Supreme Court of Pennsylvania. This Court stated the question presented in these words (p. 99):

> The question, whether the opinion of the Supreme Court of the State in the former action is conclusive evidence of the law of Pennsylvania in a court of the United States, depends upon the further question whether the opinion is declaratory of the settled law of Pennsylvania as to the effect of such devises, or is a decision upon the construction of this particular devise.

The court then considered the decision of the Pennsylvania Court, held that it did not represent a

settled rule of property in that State, and concluded that it was not binding in the Federal court.

The principles of these cases were reviewed in detail in *Kuhn* v. *Fairmont Coal Co.*, 215 U. S. 349. And, finally, in *B. & W. Taxi Co.* v. *B. & Y. Taxi Co.*, 276 U. S. 518, the same cases were relied on by this Court in upholding the validity of a contract although the state court had held such contracts invalid. The Court pointed out that the applicable rule was that in the absence of a local statute the Federal courts are free to exercise their independent judgment in the construction of wills, commercial papers, insurance policies, and on other questions of general law.

The principle established by these cases would seem to require the conclusion that the decree of the state court in this case is not conclusive upon this Court in determining the question now before it. No question of the construction and application of a state statute was involved before the Illinois Appellate Court, nor can its decree be considered an application of a settled rule of property in that State. Indeed, as we shall contend below, and as was argued by the dissenting Judge in the Appellate Court (R. 73), the decision of the Appellate Court appears to be quite contrary to the decisions of the Illinois Supreme Court. Under such circumstances, we contend, the decision of the Illinois Appellate Court does not operate to

prevent this Court from considering the question presented on its merits.

The present situation is clearly distinguishable from that which was involved in *Freuler* v. *Helvering,* 291 U. S. 35. That case presented a considerable similarity on its facts to this case; there, as here, the taxpayer relied upon the order of a state court which had construed the trust instrument. This superficial similarity disappears, however, when the *Freuler* case is more closely examined. That case arose under Section 219 (d) of the Revenue Act of 1921 (*infra,* p. 43) which provided that such part of the income of a trust should be taxable to the beneficiary as

> *pursuant to the instrument or order governing the distribution,* is distributable to such beneficiary, whether distributed or not, * * *. [Italics ours.]

The question arose whether certain income was taxable to the beneficiaries, and the beneficiaries relied upon an order of the Superior Court of California which determined that the income should not have been distributed to them. This Court concluded that the California court decision was determinative, saying (pp. 44, 45):

> The word "order" must be given some meaning as applied to trust income which is to be distributed periodically; and we think it clear that the section intended that the order of the court having jurisdiction of the

> trust should be determinative as to what is distributable income for the purpose of division of the tax between the trust and the beneficiary. * * * We think the order of the state court was the order governing the distribution within the meaning of the Act.

It is thus apparent that the decision in the *Freuler* case was induced in large part by the language of the statute involved in that case expressly referring the determination of the taxability of the income to the "order" of the court "governing the distribution." That language, as has been stated, appeared in Section 219 (d) of the Revenue Act of 1921. The present case arises under the Revenue Acts of 1924, 1926, and 1928. None of these Acts contains language similar to that upon which this Court relied in its decision in the *Freuler* case. The corresponding provision of the Revenue Act of 1924 is Section 219 (b) (2) (*infra*, p. 44). There is in that section no reference of any sort to the "order" of the court "governing the distribution." The provision of Section 219 (b) (2) of the Revenue Act of 1926 is the same (*infra*, p. 45). The corresponding provision of the Revenue Act of 1928 is Section 162 (b) (*infra*, p. 45). None of the statutory provisions involved in this case contain any reference to the "order" of any court. In the tax years here involved Congress did not contemplate, as it had in the earlier Act, that the order of a state court should influence the question of

Federal taxation. This Court's decision in *Freuler* v. *Helvering,* 291 U. S. 35, is therefore not controlling here since the statutes here involved do not contain the language upon which the Court there relied.

Indeed, it seems to us that this conclusion must be reached in fairness to the position of the Government in cases of this sort. The Government is largely helpless if its revenues are to be put at the mercy of arrangements substantially *inter partes* in cases like this one. The Government is never made a party in submitting these controversies to the state courts; it could not be made a party. As a matter of fact, it is not ordinarily even notified of the proceeding. In the proceeding before the Illinois courts eventuating in the opinion known as *Blair* v. *Linn,* 274 Ill. App. 23, there was no real dispute between the parties—the present petitioner and his assignees. They were in complete accord and agreement. So far as the parties to the case were concerned, the issue was largely feigned and moot. It was the Government's interest which was substantially affected by the decision, and yet the Government had no day in court, no opportunity to present the arguments opposed to those advanced by the parties before the court. Where, as in the *Freuler* case, Congress has expressly referred the matter to the decision of the state court, then no doubt the Government is bound because Congress has said that it shall be. But here the

statute has been changed; there is no longer any reference in it to the orders of state courts. Unless the Government's rights in these cases are to be put at the mercy of decisions had without allowing it a hearing, the state court decree in this case should not be given a conclusive effect.

Even if the decree of the Illinois Appellate Court might be regarded as conclusive with respect to payments of income made pursuant to it, it cannot have that effect in this case. The tax years which are now before the Court are 1924, 1925, 1926, and 1929. The income in question was received by the trustee and paid out during those years. The final judgment pursuant to the decision of the Illinois Appellate Court was not entered until March 31, 1934 (R. 76–79). It made no adjudication whatever with respect to past payments, either that they had been rightly or wrongly made, and ordered no payment or repayment by anyone on their account. Regardless of the effect which the decree may have on payments made thereafter and pursuant to it, it seems plain that it can have no retroactive effect so as to alter the legal status of income received and payments made many years before the Appellate Court decree was entered. The character and taxability of those payments was fixed when they were made and cannot be altered by a court decision made *ad hoc* and many years later.

B. THE TRUST HERE IN QUESTION WAS, UNDER ILLINOIS LAW, A SPENDTHRIFT TRUST

The will of the petitioner's father creating the trust under which the payments were made contains a very comprehensive spendthrift clause applicable to all the beneficiaries of the trust (R. 83):

> TWENTY: I do hereby declare and direct that the income from said trust fund and estate which is herein ordered to be, from time to time as the same shall be received and paid to my said wife and to my said son and to his said wife and to their children and descendants of children in the cases aforesaid shall be paid to them directly upon their separate order and receipt therefor, for their sole and separate use respectively, and that the same shall not be nor be made nor held in any manner nor by any proceedings whether in law or equity while yet in the hands of said trustees liable for or subject to the payment of any of the debts or obligations of either of the persons entitled to the same as above herein set forth.

Under this clause the income was to be paid to the beneficiaries "directly upon their separate order and receipt therefor, for their sole and separate use respectively," and it was likewise specifically provided that the income should not be subjected to the payment of the beneficiaries' debts through "any proceedings whether in law or equity." It would seem plain that this language

was sufficient to establish a complete spendthrift trust under the settled law of Illinois. No jurisdiction in the United States, except possibly Pennsylvania and Massachusetts, has given the spendthrift trust a more wholehearted reception than has Illinois.[2]

No decision of the Illinois Supreme Court has evidenced the least requirement that any specific phraseology is essential to the creation of a spendthrift trust. Examination of a few of the cases will be sufficient to make this point plain. In *Bennett* v. *Bennett*, 217 Ill. 434, the trust instrument contained no specific words of restraint on alienation. It simply left the sum of $3,000 to a trustee to pay the income to the testator's son until he reached the age of forty years, and then to pay him the principal. Under certain contingencies the principal was not to be paid to the son until he was fifty years of age. In considering this will, the Illinois Supreme Court said (p. 440): "We regard the trust here created and under consideration as what is known as a spendthrift trust, created for the purpose of providing for the maintenance of appellant and at the same time securing it against his improvidence and incapacity for self-protection." And further on in its opinion the court said (p. 442): "The fact that a trustee was appointed and vested with the estate and the bene-

[2] The numerous Illinois cases are reviewed in Griswold, *Spendthrift Trusts* (1936), Secs. 176–178.

ficiary was given the income only is a circumstance from which the intention of the testator to create a spendthrift trust may be inferred." This language was quoted with approval in the Illinois Supreme Court in *Wallace* v. *Foxwell*, 250 Ill. 616, 627–628.

Of particular interest in the present connection is *Wagner* v. *Wagner*, 244 Ill. 101. In this case the court said (p. 111):

> To create a valid spendthrift trust it is not necessary that the *cestui que trust* should be denominated a spendthrift in the will or that the testator should give his reasons for the creation of it. *Nor is it necessary that the will shall in express terms contain all the restrictions and qualifications incident to such trusts.* If, upon a consideration of the will, it appears the intention of the testator was to create such a trust, effect will be given to that intention. [Italics ours.]

This language, too, was quoted with approval in *Wallace* v. *Foxwell*, 250 Ill. 616, 628.

It is true that none of these cases involved the exact question whether the instrument before the court was sufficient to restrain voluntary alienation as well as alienation at the suit of creditors. In view of the sweeping language in the courts' opinions, it seems difficult to doubt that the restraint would have been applicable to both sorts of alienation since both types of restraint are essen-

tial to the full protection of the beneficiary. We are not, however, left in doubt as to the attitude of the Illinois court upon this point. *Hopkinson* v. *Swaim*, 284 Ill. 11, involved a trust the income of which was to be paid to the beneficiaries "directly" (the very word used in the trust instrument in the present case [R. 83]), and which was also "to remain free and exempt from the power and control of any husband and from liabilities for any debts or engagements." There was no express restraint against voluntary alienation. Of this trust the Illinois Supreme Court said (pp. 22–23):

> While the will does not expressly state that the income shall not be subject to alienation by the beneficiary it does state that the income shall be paid to each one directly, which means without the intervention of any medium, agent, or go-between, and not only for her separate use and benefit, free and exempt from the power and control of her husband, but also from liabilities for any debts or engagements. *There could be no such exemption from liability for debt if the beneficiary could convey or assign the income, for if she could do so it could also be seized in execution or attachment or reached by a creditor's bill. The intention of the testator determines the construction of the will, and it is not necessary that a restriction upon alienation shall appear in express terms if the intention is clearly to be gathered from the instrument.* [Italics ours.]

There can be no doubt that the beneficiary's power of voluntary alienation was directly involved in that case and was squarely passed upon by the court. The distinction of that case in the opinion of the Illinois Appellate Court (R. 70) plainly cannot stand in the light of the Supreme Court's language quoted above.

This examination of the Illinois cases would seem to make it plain that it is the settled law of the highest court of that State that an instrument containing language such as that before the Court in the present case results in the creation of a spendthrift trust, a spendthrift trust which is a bar against voluntary alienation as well as against alienation at the suit of creditors.

The same result has been reached by many other courts. In *Shankland's Appeal,* 47 Pa. 113, one of the very early spendthrift trust cases, the will devised property upon trust to pay the income to the beneficiary for his life "without being subject to his debts or liabilities." There was no express restraint against voluntary alienation. The court held that nevertheless the beneficiary did not have power to make a voluntary conveyance of his interest. *Barker's Estate,* 159 Pa. 518, arose over a will providing that the beneficiaries' interests should "be enjoyed by him and them without being in any way subject to or liable for the debts or engagements of my said husband or any of our children." In spite of the absence of a restraint upon volun-

tary alienation, an attempted alienation by a beneficiary was held invalid. See also to the same effect *Welsh's Estate,* 28 Pa. Dist. Rep. 909. A similar result was reached by the Virginia court in *Thomas* v. *House,* 145 Va. 742. Another similar case raising this point is *Jones* v. *Harrison,* 7 F. (2d) 461 (C. C. A. 8th), certiorari denied, *Jones* v. *Ready,* 270 U. S. 652. In that case the will directed that the payments should be made to the beneficiary "direct" (substantially the same word as that used in the present will). The court held that this was sufficient to create a spendthrift trust. The court said (p. 465): "This results from the fact that an estate put in trust, and expressly restricted as to creditors, sufficiently evidences an intent by the testator to impose a restriction also upon the beneficiary's power to alienate or encumber." The previous decision in the present controversy, *Commissioner* v. *Blair,* 60 F. (2d) 340 (C. C. A. 7th), certiorari denied, 288 U. S. 602, is, of course, a square authority to the same effect. See also *King* v. *United States,* 84 F. (2d) 156 (C. C. A. 1st), which is discussed more fully at pp. 31–32 below, and *Croom* v. *Ocala Plumbing & Electric Co.,* 62 Fla. 460.

It should not be overlooked that the interest of the beneficiary of a trust is by statute free from the claims of creditors in Illinois regardless of the terms of the trust. Ill. Rev. Stat. (Smith–Hurd 1935) c. 22, Sec. 49; *Spindle* v. *Shreve,* 111 U. S.

542; *Steib* v. *Whitehead,* 111 Ill. 247. The expressed intention of the settlor to subject the beneficiaries' interests to protective restraints serves no purpose, therefore, unless it is applicable to bar voluntary alienation. The Illinois Appellate Court argued that the testator had complete confidence in the petitioner's business ability and that this circumstance indicated that he did not intend to create a spendthrift trust. (R. 71.) But the petitioner is not the only beneficiary of the trust. His mother, a widow, his wife, and his children, minors at the time, are also beneficiaries. The same spendthrift clause is applicable to all (R. 83). It seems hard to doubt that the testator did intend to establish a complete restraint for the protection of these beneficiaries. The petitioner can hardly contend that this one clause imposes a lesser restraint on him than on the other beneficiaries of the trust.

In the foregoing paragraphs, it has been contended that it is the settled law of Illinois, as well as the uniform conclusion of other decisions which have considered the point, that an express restraint in a trust instrument against alienation at the suit of creditors is sufficient to bar voluntary alienation as well. It is a most significant fact that no other conclusion could be reached if the purpose of protecting the property from the creditors of the beneficiary is to be fulfilled. This follows from the clear provisions of Section

70 (a) (5) of the Bankruptcy Act, c. 541, 30 Stat. 544, 565 (U. S. C., Title 11, Section 110 (a) (5)) which provides in terms that the trustee in bankruptcy is vested with the title of the bankrupt to "property which prior to the filing of the petition he could by any means have transferred * * *." Under this statute if the interest of the petitioner in the present trust is subject to his power of voluntary alienation, then it is property which would pass to his trustee in bankruptcy. If the decision of the Illinois Appellate Court in this case is sound, therefore, the interest of the beneficiary is subject to the claims of creditors upon bankruptcy in spite of the express restraint against the claims of creditors. This is a difficulty which was not considered by the Illinois Appellate Court in its opinion. Perhaps it was not suggested to that court by counsel who were anxious to receive an opinion granting the power of voluntary alienation. Nevertheless, if the decision of the Illinois Appellate Court is correct, the petitioner's interest is subject to the claims of his creditors upon bankruptcy. This seems almost irresistably to show the error of that court's decision, quite apart from its inconsistency with the settled rule established by the decisions of the Supreme Court of Illinois.

This difficulty is clearly shown through a comparison with a decision by this Court which involves a question very closely analogous to that

raised in the present case. This decision is *Eaton* v. *Boston Safe Deposit & Trust Co.*, 240 U. S. 427. This case arose on a writ of error to a decision of the Supreme Judicial Court of Massachusetts, reported as *Boston Safe Deposit & Trust Co.* v. *Luke*, 220 Mass. 484. The will in question provided that the trustee should pay an annuity of $3,000 to the beneficiary, "said income to be free from the interference or control of her creditors." The Massachusetts court held that since a creditor could not reach this income, the trustee in bankruptcy of the beneficiary could not either. In its opinion, the court observed (220 Mass. at 485):

> There is nothing in the will which forbids the life tenant's assigning her equitable life interest. It follows that it was assignable.

This was a clear decision by the state court of last resort that the interest of the beneficiary in question was capable of voluntary alienation in spite of the restraint against the claims of creditors.

The trustee in bankruptcy then carried the case to this Court. The issue thus presented to this Court was extremely similar to that involved in this case. The state court there, as here, had held that the beneficiary's interest was assignable. Should this decision be regarded as conclusive in considering the application of a Federal statute, there the bankruptcy law, here the taxing Acts? The parallel between that case and this is close enough to justify a rather full quotation. This

Court, speaking through Mr. Justice Holmes, said (240 U. S. at 428, 429):

> If it be true without qualification that the bankrupt could have assigned her interest * * * the argument would be very strong that the statute intended the fund to pass. There would be an analogy at least with the provision giving the trustee all powers that the bankrupt might have exercised for her own benefit, Sec. 70 a (3), and there would be difficulty in admitting that a person could have property over which he could exercise all the powers of ownership except to make it liable for his debts. The conclusion that the fund was assignable was based on two cases, and we presume was meant to go no farther than their authority required. The first of these simply held that an executor was not liable on his bond for paying over an annuity to an assignee as it fell due, when the assignor to whom it was bequeathed free from creditors had not attempted to avoid his act. *Ames* v. *Clarke,* 106 Massachusetts, 573. The other case does not go beyond a dictum that carries the principle no farther. *Huntress* v. *Allen,* 195 Massachusetts, 226. It is true that where the restriction has been enforced there generally has been a clause against anticipation, but the present decision in following them holds the restricting clause paramount, and therefore we feel warranted in assuming that the power of alienation will not be pressed to a point inconsistent with the dominant intent of the will.

This Court, therefore, did not follow the Massachusetts decision although it was rendered in the same case and between the same parties, a situation not present here. The decision of this Court seems clearly to have been a decision that the interest in question was not subject to voluntary alienation in spite of the state court's decision that it was. In such light, the case is directly applicable here. In that case, this Court exercised its independent judgment when the application of the Federal Bankruptcy statute was involved. It should similarly exercise its own judgment here where the application of the Federal Revenue Act is in question.

That this is the proper interpretation of this Court's decision in *Eaton* v. *Boston Safe Deposit & Trust Co.*, 240 U. S. 427, is confirmed by a recent decision of the First Circuit Court of Appeals in *King* v. *United States*, 84 F. (2d) 156. That case, as this, involved the taxation of income paid under a trust. It was contended, as here, that the trust instrument restrained only alienation at the suit of creditors and did not invalidate a voluntary assignment executed by the taxpayer. The court held that the decision was controlled by this Court's opinion in *Eaton* v. *Boston Safe Deposit & Trust Co.*, 240 U. S. 427. The court quoted from the opinion of the Massachusetts court in *Boston Safe Deposit & Trust Co.* v. *Luke*, 220 Mass. 484, and then set out substantially the same quotation

from this Court's opinion which has been set forth above. This conclusion was then reached (84 F. (2d) at 159):

> This decision in effect holds that the power of alienation is restricted, not absolute, even where the clause simply provides the "income be free from the interference or control of his creditors." * * *
>
> In view of these decisions of the Massachusetts court and of the Supreme Court of the United States, we conclude that, under the law of Massachusetts, income accruing under a trust containing such provisions as are here shown is made incapable of transfer in anticipation of its accrual by an assignment of the beneficiary.

Under the decision in *Eaton* v. *Boston Safe Deposit & Trust Co.*, the interest of the petitioner in this case would not be held to be assignable if the question arose in the event of his bankruptcy. If his interest is not assignable in that event, it seems difficult to see how it can be regarded as assignable when the controversy arises with respect to taxation rather than with respect to bankruptcy. The petitioner should not be allowed to blow both hot and cold, to have a decision of non-assignability in the event of bankruptcy, and to have a decision of assignability when it will save him income taxes. We submit, therefore, that under the settled law of Illinois and under the decisions of this Court, the interest of the petitioner in this case was not

subject to his voluntary alienation, that the trust here in question was a spendthrift trust, and hence that the income therefrom is properly taxable to petitioner.

III

THE TRANSACTIONS WERE ASSIGNMENTS OF FUTURE INCOME AND NOT OF A PRESENT INTEREST

Petitioner assigned to his children specified amounts to be paid annually out of the net income which he "now is, or may hereafter be, entitled to receive during his life from the Trustees under the Will of William Blair, deceased" (R. 83), and contends that such assigned income is not taxable to him.

The question whether income is taxable to the assignor or to the assignee is found in many decided cases involving different factual situations.[3]

[3] They may be grouped under four headings: (1) Assignment of present or future earnings (*Lucas* v. *Earl*, 281 U. S. 111; *Van Meter* v. *Commissioner*, 61 F. (2d) 817 (C. C. A. 8th); *Hall* v. *Burnet*, 54 F. (2d) 443 (App. D. C.); (2) Assignment of income from property (*Corliss* v. *Bowers*, 281 U. S. 376; *Dickey* v. *Burnet*, 56 F. (2d) 917 (C. C. A. 8th), certiorari denied, 287 U. S. 606); (3) Assignment of contract interests (*Burnet* v. *Leininger*, 285 U. S. 136; *Nelson* v. *Ferguson*, 56 F. (2d) 121 (C. C. A. 3d), certiorari denied, 286 U. S. 565; *Washington* v. *Commissioner*, 80 F. (2d) 829 (C. C. A. 2d); (4) Assignments of income from estates or trusts (*Commissioner* v. *Field*, 42 F. (2d) 820 (C. C. A. 2d); *Helvering* v. *Coxey*, 79 F. (2d) 661 (C. C. A. 3d); *O'Malley-Keyes* v. *Eaton*, 24 F. (2d) 436 (Conn.); *Young* v. *Gnichtel*, 28 F. (2d) 789 (N. J.); *Shellabarger* v. *Commissioner*, 38 F. (2d) 566 (C. C. A. 7th); *Sarther Grocery Co.* v. *Commis-*

In all these cases, the courts have applied, though not always consistently, the general rule that income from personal services is taxable to the one who earns it; that income from property is taxable to the owner or to the one retaining control of the property producing the income, and that any anticipatory arrangement designed in such cases to divert income to another is ineffective to defeat the tax. *Lucas* v. *Earl*, 281 U. S. 111; *Burnet* v. *Leininger*, 285 U. S. 136; *Corliss* v. *Bowers*, 281 U. S. 376.

In the instant case, we have the problem of applying this general rule to the situation where a life beneficiary of the income of a trust purports to assign a part of such income. The petitioner assigned to each of his children "an interest" (of various amounts) in the net income which he was entitled to receive. (R. 83–84.) Such an assignment has been viewed as merely a release of anticipatory income, and not an assignment *in praesenti* of an existing property right (*Wood* v. *Commissioner*, 74 F. (2d) 78 (C. C. A. 6th)); or, as viewed by the court below in the present case, merely a direction to the trustees to pay to his children, out of income due to him, various specified

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sioner, 63 F. (2d) 68 (C. C. A. 7th); *Wood* v. *Commissioner*, 74 F. (2d) 78 (C. C. A. 6th); *Porter* v. *United States*, 52 F. (2d) 1056 (C. Cls.); *Brewster* v. *United States*, 9 F. Supp. 686 (C. Cls.); *Shanley* v. *Bowers*, 81 F. (2d) 13 (C. C. A. 2d); *Lowery* v. *Helvering*, 70 F. (2d) 713 (C. C. A. 2d)).

amounts each year, the theory being that petitioner's right as a beneficiary was solely to receive the income as and when it should be earned and become due and that it was his property before it was theirs, that the income-producing *res* is the *corpus* of the trust and not the beneficiary's right to receive (even though such right is ordinarily treated by equity as creating an interest in the corpus of the trust), and that the assignment by the beneficiary of his right to receive income conveys no part of the income-producing corpus to the assignee.

On the other hand, it has been viewed as an interest presently assignable, like a bond or a building (*Commissioner* v. *Field,* 42 F. (2d) 820 (C. C. A. 2d)), while, in *O'Malley-Keyes* v. *Eaton,* 24 F. (2d) 436 (Conn.), the court held that the assignment of the right to receive income left the assignor without any rights in the trust or its income. See also *Young* v. *Gnichtel,* 28 F. (2d) 789 (N. J.).

The statute itself, we submit, points to the correct solution of the problem. It deals explicitly with the liability of estates or trusts and reveals clearly where Congress intended to impose responsibility for the tax. It provides: " * * * the tax shall be computed upon the net income of the estate or trust, and shall be paid by the fiduciary". (Section 219 (b).) It further provides: "There shall be allowed as an additional deduction in computing the net income of the estate or trust the

amount of the income of the estate or trust for its taxable year which is to be distributed currently by the fiduciary to the beneficiaries * * * but the amount so allowed as a deduction shall be included in computing the net income of the beneficiaries whether distributed to them or not". (Section 219 (b) (2).)

A tax statute is here involved. The import and reasonable construction of the statute are controlling. The statute here is plainly worded. It imposes the liability for the tax on the beneficiary receiving trust income. No liability is placed upon his assignees, and, though they may have enforceable rights against the assignor in courts of equity, the statute points unmistakably to the beneficiary as the one answerable for the tax. No Congressional intent is disclosed to treat the beneficiary's assignee as a beneficiary or a substituted beneficiary. For tax purposes, the petitioner's status as beneficiary is unalterably fixed. Equity may regard the assignment as extinguishing petitioner's rights *in rem* as equitable owner of the trust *res*, or his rights *in personam* against the trustee, but the tax statute, nevertheless, fixes the accountability for the tax upon the petitioner because of his status as beneficiary.

An analogous situation is found in *Burnet* v. *Leininger*, 285 U. S. 136. In that case a husband assigned to his wife one-half of his interest in a partnership and contended that each should return

and pay tax upon one-half of the income attributable to that interest. The taxing Act (Section 218 (a), Revenue Acts of 1918 and 1921) explicitly dealt with the liability of partners as such. This Court said that Congress could and did tax each partner on his distributive share of partnership profits, and held (p. 141):

> In view of the clear provision of the statute, it cannot be said that Leininger was required to pay tax upon only a part of this distributive share because of the assignment to his wife.

An estate or trust is a taxable entity (Section 2 of the Revenue Act of 1924). The fiduciary is responsible for the tax (Section 219 (b), *infra*). Congress, in exercising its authority to tax income, could have imposed the liability for the tax on the fiduciary, without allowing a deduction for distributions of income to beneficiaries. Or it could have relieved the fiduciary of responsibility for the tax on distributions and imposed the liability on the beneficiaries. Congress chose to do the latter. It cannot, therefore, be said that the petitioner is required to pay tax upon only a part of the trust income simply because he made assignments of such income to his children. The statute taxes salaries to those who earn them (*Lucas* v. *Earl, supra*); the statute also taxes partnership income to the individuals carrying on business in partnership (*Burnet* v. *Leininger, supra*). The statute

taxes trust income to the beneficiaries in case of distributions. In all three classes of cases, assignments of income are ineffectual to relieve the assignor from liability for the tax.

The taxpayer in the *Leininger* case urged that the assignment to his wife was of one-half of the "corpus" of his interest in the partnership, and that this "corpus" produced the income in question. This Court stated that that which produced the income was not Mr. Leininger's individual interest in the firm, but the firm enterprise itself; that there was no transfer of the corpus of the partnership property to a new firm, and that her interest in the firm was derivative only, even though the agreement constituted her the beneficial owner of one-half of the income which her husband received from the firm enterprise.

The same considerations are applicable here. The corpus of the trust produced the income in question, not the beneficiary's right to receive it. The agreements with the children amounted to no more than equitable assignments of part of what the petitioner should receive from the trust. The rights of the children were derived from the agreements with their father and rested upon the distributive share which he had and continued to have as a beneficiary of the trust.

Petitioner contends that the children became the beneficial owners of the assigned income. A

similar contention was made in the *Leininger* case, where this Court said (p. 141):

> If it be assumed that Mrs. Leininger became the beneficial owner of one-half of the income which her husband received from the firm enterprise, it is still true that he, and not she, was the member of the firm and that she had only a derivative interest.

So, even if it be assumed that the children became the beneficial owners of part of the income which the father received from the trust, it is still true that he, and not they, was the beneficiary of the trust, and that they had only a derivative interest. The very assignment in this case, as in the *Earl* and *Leininger* cases, was bottomed on the fact that the income would be the petitioner's property, else there would have been nothing on which it could operate. Cf. *Poe* v. *Seaborn,* 282 U. S. 101.

It is, therefore, immaterial whether the law considers an equitable interest for life or for a term of years as present property, alienable like any other. Even though a beneficiary's interest is alienable, as was said in *Commissioner* v. *Field, supra,* assignments of income are ineffective for tax purposes, and this would be true even if the assignments in the present case had manifested an intention to make a present transfer which would extinguish the beneficiary's rights against the trustee and create similar rights in the assignees, enforceable in equity. The cases cited by the peti-

tioner, *Lowery* v. *Helvering,* 70 F. (2d) 713; *Shanley* v. *Bowers,* 81 F. (2d) 13, and *Rossmore* v. *Commissioner,* 76 F. (2d) 520, all from the Second Circuit, follow the *Field* case, which, we submit, was incorrectly decided. There is nothing in the other cases cited by the petitioner which may be construed as permitting the taxation of trust income to any one other than the beneficiary receiving it. The case of *Irwin* v. *Gavit,* 268 U. S. 161, decided that payments received by a beneficiary out of income of a trust is not property acquired by bequest but income taxable in the hands of the beneficiary. This Court said (p. 167): "* * * a gift of the income of a fund ordinarily is treated by equity as creating an interest in the fund", and petitioner relies upon that statement to establish the existence of an assignable interest. It may be freely admitted that the assignments here gave the assignees rights which are enforceable in the courts of the State. The fact remains, however, that the Federal tax statute makes the petitioner, as beneficiary, accountable for the tax on the trust income distributable to him.

We submit that a beneficiary of a trust has only a right *in personam* against the trustee.[4] However, if it be said that a beneficiary's right rises to the dignity of an equitable life estate, corresponding to

[4] See 17 Col. Law Rev. 467, where it is argued that the right of the *cestui* is a right *in personam* against the trustee, specifically enforceable with reference to the trust *res.*

a legal life estate, such a view cannot affect the result here, due to the language of the assignments (R. 83–84):

> That the said party of the first part, * * * does hereby sell, assign, transfer and set over unto said party of the second part an interest * * * *in the net income which the said party of the first part now is, or may hereafter be, entitled to receive* during his life from the Trustees under the Will of William Blair, deceased, * * *. [Italics supplied.]

It is thus clear that here the assignments dealt only with a right to receive the income, and no attempt was made to assign any equitable right, title or interest in the trust itself. The assignments are in substance powers of attorney to receive the income to which the petitioner "may hereafter be entitled." When the assignee collects under these instruments, he does not collect his own income. By the very terms of the instruments he is to collect the income due to the petitioner. This conclusion is fortified by the decision of the Illinois Appellate Court in *Blair* v. *Linn,* 274 Ill. App. 23. If the petitioner is right in his contention that that case is controlling here, he must take the decision in its entirety. That opinion must be construed as a decision that the petitioner's assignments, though valid and effective, were merely orders on the trustee to pay to the children, at stated times, specified amounts out of his income.

It is submitted, therefore, that even if the doctrine of *res judicata* is not applicable and even if the decision of the Illinois Appellate Court may not be ignored, it nevertheless remains true that the assignments here in question did not operate to relieve the petitioner from liability for the tax on the assigned income.

CONCLUSION

The court below reached the correct result; the decision should be affirmed.

Respectfully submitted.

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DECEMBER, 1936.

APPENDIX.

Revenue Act of 1921, c. 136, 42 Stat. 246:

> SEC. 219. (a) That the tax imposed by sections 210 and 211 shall apply to the income of estates or of any kind of property held in trust, including . . . (4) Income which is to be distributed to the beneficiaries periodically, whether or not at regular intervals, and the income collected by a guardian of an infant to be held or distributed as the court may direct.
>
> (d) In cases under paragraph (4) of subdivision (a) . . . the tax shall not be paid by the fiduciary, but there shall be included in computing the net income of each beneficiary that part of the income of the estate or trust for its taxable year which, pursuant to the instrument or order governing the distribution, is distributable to such beneficiary, whether distributed or not, . . .

Revenue Act of 1924, c. 234, 43 Stat. 253:

> SEC. 213. For the purposes of this title, except as otherwise provided in section 233—
>
> (a) The term "gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service * * *, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried

on for gain or profit, or gains or profits and income derived from any source whatever. * * *.

(b) The term "gross income" does not include the following items, which shall be exempt from taxation under this title:

* * * * *

(3) The value of property acquired by gift, bequest, devise, or descent (but the income from such property shall be included in gross income); * * *.

SEC. 219. (a) The tax imposed by Parts I and II of this title shall apply to the income of estates or of any kind of property held in trust, including—

* * * * *

(b) Except as otherwise provided in subdivisions (g) and (h), the tax shall be computed upon the net income of the estate or trust, and shall be paid by the fiduciary. The net income of the estate or trust shall be computed in the same manner and on the same basis as provided in section 212, except that—

* * * * *

(2) There shall be allowed as an additional deduction in computing the net income of the estate or trust the amount of the income of the estate or trust for its taxable year which is to be distributed currently by the fiduciary to the beneficiaries, and the amount of the income collected by a guardian of an infant which is to be held or distributed as the court may direct, but the amount so allowed as a deduction shall be included in computing the net income of the beneficiaries whether distributed to them or not. * * *

The corresponding provisions of Section 213 (a) and (b), and Section 219 (a) and (b), of the Revenue Act of 1926 are identical with the foregoing; and the corresponding provisions of Section 22 (a) and (b), and Section 162 (b), of the Revenue Act of 1928 are substantially the same.

Treasury Regulations 65, promulgated under the Revenue Act of 1924:

> ART. 73. *Gifts and bequests.*—Property received as a gift, or received under a will or under statutes of descent and distribution, is exempt from the income tax, although the income therefrom derived from investment, sale, or otherwise is not. * * *
>
> ART. 342. *Method of computation of net income and tax.*—The statute provides that the tax computed upon the net income of the estate or trust shall be paid by the fiduciary, except in the case of the trusts described in article 347. However, in computing the net income of the estate or trust, the following deductions will be allowed either in addition to, or in lieu of (as the case may be) those specified in section 214 in the case of individuals:
>
> * * * * *
>
> (2) The amount of the income of the estate or trust for its taxable year which is to be distributed currently by the fiduciary to the beneficiaries, and the amount of the income collected by a guardian of an infant which is to be held or distributed as the court may direct, shall be allowed as an additional deduction in computing the net income of the estate or trust. The amount so allowed as a deduction must be included by a beneficiary in computing his net income, whether distributed to him or not. If the

> taxable year of the beneficiary differs from that of the estate or trust, the amount which he is required to include in computing his net income shall be based upon the income of the estate or trust for its taxable year ending within his taxable year. * * *

The corresponding provisions of Articles 73 and 342 of Regulations 69, relating to the Revenue Act of 1926, are identical with the foregoing; and the corresponding provisions of Articles 83 and 862 of Regulations 74, relating to the Revenue Act of 1928, are substantially the same.

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CHARLES ELMORE

IN THE

Supreme Court of the United States

October Term, 1936.

EDWARD T. BLAIR,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

No. 247

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF.

JOHN E. HUGHES,
First National Bank Bldg.,
Chicago, Illinois,
Amicus Curiae.

U. S. Law Printing Company, 2817 N. Halsted St., Chicago, Ill.

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MOTION.

Comes now the undersigned and moves for leave to file instanter the annexed brief as *Amicus Curiae.*

A letter from counsel for the petitioner and a letter from the Solicitor General consenting to the filing of this brief has been filed with the Clerk.

JOHN E. HUGHES,
First National Bank Bldg.,
Chicago, Illinois.

BRIEF AMICUS CURIAE.

May It Please The Court:

The writ should be granted in this case for the following reasons:

(1) In *Hoeper v. Tax Commission of Wisconsin, 284 U. S. 206*, this Court held that one person could not be taxed upon the income of another even in a case where the legislature had so expressly enacted. By final decree of the Illinois Court having jurisdiction over the property and the parties, the income upon which the petitioner has been taxed in this case is not and was not his income but the income of others who have received it and paid tax thereon. The Federal Revenue Act does not attempt to tax one taxpayer on the income of another in a case such as the one at bar.

(2) The decision in the case at bar is directly in conflict with the decision of the Circuit Court of Appeals for the Second Circuit in *Commissioner v. Field, 42 F. (2d) 820*. In both cases the trustees and the property in trust were located at Chicago, Illinois. In both cases a beneficiary entitled to income from a trust fund under the will of his ancestor, assigned it to another prior to its receipt. In one case the beneficiary has been held taxable on the income so assigned, while in the other he has not. In the case at bar the Court below makes no attempt to distinguish the *Field case* but state it is analogous to the case at bar.

(3) The question is of great importance in the law of income tax. The cases dealing with it in the lower Courts

are in great confusion. In *Volume II of the Law of Federal Income Taxation, Paul & Mertens, Section 15:04,* the authors say:

> "It must be confessed that the decisions bearing upon this subject are difficult to analyze and they are often not reconcilable."

In its opinion in the case at bar the Circuit Court of Appeals says:

> "The Supreme Court has not had occasion to pass upon the identical question."

(4) If the statute purported to tax petitioner on income which never at any time during the taxable year belonged to petitioner but was the income of his children it would be unconstitutional under the rule of *Hoeper v. Tax Commission of Wisconsin, 284 U. S. 206,* but the statute on the contrary provides for the taxation of this income to the beneficiaries, who under the instruments executed prior to the time the income arose are the petitioner's children, and not the petitioner. (Compare *Freuler v. Helvering, 291 U. S. 35.)* They are the persons to whom the Trustees must pay it under the Illinois Court's decree. They cannot pay it to petitioner.

ARGUMENT.

In construing the trust in the case at bar the Appellate Court of Illinois in *Blair v. Linn, 274 Ill. App. 23,* said:

> "This appeal presents the question whether Edward Tyler Blair, a defendant, could assign a portion of the trust income devised to him by his father's will *before he received it.*" (Italics ours.)

The Court answered the question in the affirmative and upheld the assignments. Under this decision the trustees are bound to pay this income to the assignees. They cannot pay it to the petitioner.

Besides the statute provides for its taxability to the beneficiaries to whom the trustees under the Court decree are bound to distribute it and not to petitioner who under the Court decree cannot get it. *Section 219 (b) (2)* of both the *Revenue Acts of 1924 and 1926* (p. 11 Brief in opposition) reads in the applicable part as follows:

> "There shall be allowed as an additional deduction in computing the net income of the estate or trust the amount of the income of the estate or trust for its taxable year *which is to be distributed currently by the fiduciary to the beneficiaries* * * * but *the amount so allowed as a deduction shall be included in computing the net income of the beneficiaries whether distributed to them or not.*" (Italics ours.)

If your Honor has an annuity and assigns it today to A, certainly you cannot be taxed on it in future years. The situation is analogous in the case at bar. See *Commissioner v. Field, 42 F. (2d) 820,* at page *822.* Or if you now have the right to receive for the rest of your life the income of the largest estate in America you have a present right which you can sell at once (so stated in *Com. v.*

Field, 42 F. (2d) at page *822)*, if you can find a buyer, assuming that, as the Illinois Court has held in the case at bar, there are no restrictions on its alienation. You may also give it away, and if you do the gift is subject to a gift tax, its value being computed on mortality tables. *Continental Illinois Bank & Trust Company v. Commissioner, 29 B. T. A. 945.*

Furthermore, the case at bar is directly in conflict with *Commissioner v. Field, 42 F. (2d) 820 (C. C. A. 2nd).* When the question at bar first came before the Board of Tax Appeals in *Edward T. Blair, 18 B. T. A. 69,* the Board was unable to distinguish it from the *Field case* and after citing and quoting from its decision in the *Field* case, it said at page *75:*

"We regard this case as controlling here".

The Commissioner appealed to the Circuit Court of Appeals for the Seventh Circuit and that Court in *Commissioner v. Blair, 60 F. (2d) 340,* said at page *342:*

> "The only question presented for our determination is whether the law will permit the trust income devised to respondent by his father's will to be assigned by him *prior to his actual receipt of it. If this question be answered in the affirmative, the ruling of the Board is correct;* if it be answered in the negative respondent is properly chargeable with the taxes assessed, and the cause must be reversed." (Italics ours.)

The Court then proceeded to answer the question in the negative and hold that the income could not be assigned. Subsequently the Appellate Court of Illinois, in *Blair v. Linn, 274 Ill. App. 23,* held that the Circuit Court of Appeals had given the wrong answer under the Illinois law and it did answer the question in the affirmative. This decision, as the Circuit Court of Appeals recognizes in the

case at bar, is binding on it by virtue of *Freuler v. Helvering, 291 U. S. 35.* Although the Appellate Court of Illinois had said that the question was whether the petitioner could assign the income *prior to his receipt of it* and had answered it in the affirmative, yet the Circuit Court of Appeals in the case at bar, after saying that this answer is binding on it proceeds to hold contrary thereto and reverses the well considered opinion of the Board of Tax Appeals, reported in *31 B. T. A. 1192,* saying in *83 F. (2d)* at page *662:*

> "The income was not even subject to his disposition until he received it".

This is exactly what it held the first time the case was before it and directly contrary to the subsequent decision of the Illinois Court.

The Circuit Court of Appeals makes no attempt to distinguish the decision of the Second Circuit in *Commissioner v. Field, 42 F. (2d) 820,* but says in *83 F. (2d) 660,* the question was "an analogous question" to that in this case.

After stating that it is bound by the decision of the Appellate Court of Illinois as to validity of the assignments it says that the question is not one of the validity of the assignments but "it is one involving the date when the income became transferable."* And then goes on to say,

> "the son's interest was therefore not in any way attached to the *corpus* of the estate that produced the income. *The income was not even subject to his disposition until he received it.*" (Italics ours.)

---

* The question really was whether petitioner owned the income at any time during the taxable year. If not he could not be taxed thereon. **Hoeper v. Wisconsin, 284 U. S. 206.**

As we have pointed out, the Appellate Court of Illinois stated that the question before it was whether the son "could assign a portion of the trust income devised to him by his father's will *before he received it*," and after stating the question answered it in the affirmative.

Although the Court below did not attempt to distinguish the decision of the Second Circuit in the *Field case* and although the Board of Tax Appeals could not distinguish it, the respondent on page 8 of his brief in opposition attempts to distinguish it on the ground that "the language of the assignment clearly indicates an intention to transfer an undivided interest in the *corpus* of the trust estate". The distinction will not stand. The instrument in the *Field case* is set forth in *15 B. T. A. p. 721.* It

> "does hereby sell, assign, transfer and set over unto the said party of the second part an undivided two-thirds *interest in all the net income* of the two-fifths of the residuary estate of Marshall Field, deceased." (Italics ours.)

Furthermore, later decisions of the Second Circuit, such as *Lowery v. Helvering, 70 F. (2d) 713,* and *Shanley v. Bowers, 81 F. (2d) 13,* at page *15,* show that the decision of the Circuit Court of Appeals for the Second Circuit was not put on any such ground. See also *Helvering v. Matchette, 81 F. (2d) 73,* in which this Court at the last term denied the Government's petition for *certiorari.* The Government in its brief in opposition on page 9 states that in New York "an assignment of all of the income, without more, is effective to transfer the interest of the assignor in the *corpus*". The law of Illinois is the same. See *Binns v. LaForge, 191 Ill. 590,* cited by the Circuit Court of Appeals for the Second Circuit in the *Field case.*

In *Lowery v. Helvering, 70 F. (2d) 713,* it is said at page *714:*

> "In England for over a century the bare gift of the income of property has ordinarily passed the 'general property' to the donee".

In *Ingersoll v. Coran, 211 U. S. 335,* this Court said at page *368:*

> "In *Walker v. Brown, 165 U. S. 654,* it was held that every express executory agreement in writing, whereby the contracting parties sufficiently indicate an intention to make some particular property, real or personal, or fund, therein described or identified, a security for a debt or other obligation, creates an equitable lien on the property so indicated."

Under the law of Illinois as stated by the Court of Appeals for the Second Circuit in *Commissioner v. Field, 42 F. (2d) 820,*

> "so far as we know it is universally true that the law considers an equitable interest for life or for a term of years as present property alienable like any other. * * * The law of Illinois is the same."

The brief in opposition attempts to justify the decision below on the ground that

> "the Court below held that the opinion of the Illinois Appellate Court required the conclusion that the assignments made by petitioner were not of a share in the *corpus,* but only of specified amounts payable out of the income as he received it."

If the Court below had made any such holding, it would have misconstrued the opinion of the Illinois Appellate Court, but it made no such holding. Instead of holding that the Appellate Court's opinion required this conclusion it squarely said in *83 F. (2d) 655,* at page *662,* that the Twentieth paragaph of the Will required this conclu-

sion. As we have pointed out, the Appellate Court of Illinois construed the Will otherwise .

The question of the effect of assignments of income on income taxes and the validity thereof has recently received the consideration of the House of Lords in the case of *Inland Revenue Commissioners v. Duke of Westminster*, decided May 7, 1935, published in *L. J. R. 104*, at page *383*, and the Court is referred to the opinions of Lord Tomlin, Lord Russell of Killowen, Lord MacMillan and Lord Wright. In that case it was held that the money assigned should be excluded from the taxpayer's income.

The writ of *certiorari* should be granted in the case at bar, for if the decision below is upheld the taxpayer who has years before executed irrevocable, valid assignments, can find himself confronted with an income tax which exceeds his annual income.

All of which is respectfully submitted.

JOHN E. HUGHES,
First National Bank Bldg.,
Chicago,
Amicus Curiae.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1936.

No. 247

EDWARD T. BLAIR,
Petitioner,

vs.

GUY T. HELVERING, Commissioner of Internal Revenue,
Respondent.

MOTION AND BRIEF OF *AMICUS CURIAE.*

EDWARD N. PERKINS,
Amicus Curiae.

IN THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, A. D. 1936.

No. 247

EDWARD T. BLAIR,
Petitioner,

vs.

GUY T. HELVERING, Commissioner of Internal Revenue,
Respondent.

MOTION FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE.*

Now comes Edward N. Perkins of 15 Broad Street, New York City, and moves this Honourable Court for leave to file the annexed brief as *amicus curiae,* the consent of counsel for the petitioners and that of counsel for the respondent having been first obtained. The undersigned asks this leave as counsel for a party whose rights respecting a still existent state of facts presenting the same questions here now presented have been adjudicated as between the Commissioner of Internal Revenue and himself in a manner inconsistent with the adjudication here under review, wherefore said party has substantial interest in the outcome in the present cause. Your petitioner as counsel presented the cause referred to before the United States Board of Tax Appeals and before the Circuit Court of Appeals for the Second Circuit and now seeks opportunity to endeavour to corroborate the rights thereby established.

EDWARD N. PERKINS,
15 Broad Street,
New York, N. Y.

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IN THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, A. D. 1936.

No. 247

EDWARD T. BLAIR,
Petitioner,
vs.
GUY T. HELVERING, Commissioner of Internal Revenue,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF OF *AMICUS CURIAE.*

Facts.

Fully adequate statement of the facts upon this particular record is supplied by the petitioner's brief. We confine ourselves to the statement in general terms of the point up for decision, as follows:

> Edward Tyler Blair, the petitioner, a *cestui que trust,* assigned voluntarily "an interest amounting "to * * * $9000. in each calendar year * * * in the "net income" of the trust thereafter to accrue. The Appellate Court of Illinois held, and pursuant thereto the Superior Court of Cook County (Illinois) decreed, binding all parties in interest, that the *cestui's* interest was assignable and that Edward Tyler Blair validly assigned a "part of his interest "in said trust estate" (R. page 90). Those courts were courts of competent jurisdiction. The question

here is, whether the $9000. yearly paid to the assignee are nevertheless taxable income *to the assignor*.

We observe that the Illinois Court's decree referred to is two-fold: *First*, it holds that the interest concerned was assignable (R. page 90); and, *secondly*, it holds that the assignment was a valid assignment of a part of the assignor's interest in the trust estate (R. page 90), so that the assignor was thereby excluded from the income assigned which the assignee became entitled to have directly from the trustees and in his own right.

SUMMARY OF ARGUMENT.

I.

The state courts of Illinois having jurisdiction have determined the petitioner's rights, namely, in effect, that the petitioner has validly assigned a part of his interest in the trust estate productive of the income concerned (Petitioner's Exhibit 17, R. pages 88-91). That determination is conclusive upon the respondent in the present case (*Freuler* v. *Helvering*, 291 U. S. 35; *Uterhart* v. *United States*, 240 U. S. 598) because a taxpayer whose rights have been adjudged conclusively as to him by a state court of competent jurisdiction can have no other rights than those so adjudged.

II.

The legal effect of the adjudication of the Illinois Court, to wit, that the petitioner has parted with the property or right productive of the income concerned, is that the assignee became the owner of that interest or right and therefore the only person to whom the income derived from it can be taxed, since income cannot be taxed to one who

has no right or relation to it. The thing assigned was an interest in a beneficial estate, being not the money received before or after any given time as income, but the legal unit of right with which the right to the income goes, which is a property right carrying a title or present right to the future income from the moment of the assignment. (*United States* v. *Fidelity Trust Co.*, 222 U. S. 158; *Maguire* v. *Trefry*, 253 U. S. 12; *Matter of Stanfield*, 135 N. Y. 292). And this is so whether or not the thing assigned be deemed an equitable estate or a chose in action (*Senior* v. *Braden*, 295 U. S. 422; See 17 Col. L. Rev., p. 475).

III.

The court below has erred in holding the income concerned taxable to the petitioner, because what was assigned was a property right or presently existing chose in action, as stated above. Consequently the income concerned belonged to the owner of the right and had nothing to do with the assignor who had parted with the right, and this is the holding of the Circuit Court of Appeals for the Second Circuit in *Commissioner* v. *Field* (42 Fed. [2d] 820), where the distinction is shown between this case and a case like *Lucas* v. *Earl* (281 U. S. 111).

IV.

The distinction between a case like the present and such a case as *Lucas* v. *Earl* is perfectly clear. The basic difference between the case of an anticipatory attempt to deflect future income, which is *Lucas* v. *Earl*, and a case where a present existing property interest or right passes presently, may be illustrated by comparing *Rosenwald* v. *Commissioner* (33 Fed. [2d] 423), with the present case. *Lucas* v. *Earl* was a case of an anticipatory attempt to deflect income, as this court recognizes in *Poe* v. *Seaborn* (282 U. S.

101), saying, at page 117, that the attempted assignment relied upon in *Lucas* v. *Earl* was bottomed on the fact that the income concerned, which was earnings, would be the husband's property in order that the supposed assignment might be effective; that otherwise the assignment would have had nothing to operate upon. Here, the existing beneficial interest in the trust estate is what the assignment operated upon, whether it be regarded as an estate or interest in property, or as a complex of choses in action.

ARGUMENT.

I.

The decree above referred to of the Illinois Court concludes the parties to it, of whom the petitioner was one, and therefore concludes the government here since its rights depend on the taxpayer's rights.

This seems not only self-evident, but settled by *Freuler* v. *Helvering* (291 U. S. 35), and *Uterhart* v. *United States* (240 U. S. 598). In the *Uterhart* case this court said, as to the effect on Government's rights when taxing, of a state court's determination of the taxpayer's rights:

> "It is very properly admitted by the Government that the New York decree is in this proceeding binding with respect to the meaning and effect of the will. The right to succeed to the property of the decedent depends upon and is regulated by state law (178 U. S. 41, 57) and it is obvious that a judicial construction of a will by a state court of competent jurisdiction determines not only legally but practically the extent and character of the interests taken by the legatees."

We observe that similarly a decree of a state court of competent jurisdiction binding upon assignor and assignee as well as trustees, as to the effect of an assignment affecting trust income, determines not only legally but practically

the extent and character of the interests taken by the assignee.

In *Freuler* v. *Helvering* (*supra*) section 219 (d) of the 1921 Act made the "order", if any, governing distribution, controlling. There was a decree of the California court directing the trustees to retain certain amounts against capital depreciation and the controversy related to those amounts. The argument then centered on whether that decree was the order controlling distribution within section 219 (d). This court held that it was. And the reason is, that that decree did, in fact, control the distribution concerned. Accordingly this court (at page 44 of the 291st U. S.) said:

> "* * *. But, if the order of the state court does *in fact* govern the distribution, it is difficult to see why * * * it should not be effective to fix the amount of the taxable income of the beneficiaries. * * *." (Italics ours.)

The decree of the Illinois Court stands as the law of this case so far as concerns the effect of the assignment. We apprehend that this court will regard itself as constrained to hold that on this head the decision of the Appellate Court of Illinois is conclusive.

II.

The effect of the decree of the Superior Court for Cook County entered pursuant to the decision of the Appellate Court of Illinois, is that the assignee is the owner of an estate or interest productive of the income concerned.

This decree of the Superior Court for Cook County is that the assignment was an assignment of "a part of the "interest of said Edward Tyler Blair [the assignor] in "said trust estate" (R. page 90), and was valid (*ibid.*); that the assignor's interest was freely assignable volun-

tarily (*ibid.*). Then the assignee became the owner of that *interest.* An interest in a beneficial estate is "a vested life estate in a fund"; it is "the legal unit of right"; it is not "the money received before or after a given moment". (*Per* Holmes, J., in *United States* v. *Fidelity Trust Co.,* 222 U. S. 158.) The money received goes to the owner of the interest or "legal unit of right" by virtue of that ownership. That ownership is a "property right belonging to "the beneficiary". (*Maguire* v. *Trefry,* 253 U. S. 12.) A bequest, like an assignment, is a transfer of an interest. As the New York Court of Appeals has expressed it, "a be- "quest of income to a legatee for life must be construed "to invest him *with a title* to such income *from the date of "the testator's demise".* (Italics ours. *Matter of Stanfield,* 135 N. Y. 292.)

Whether an equitable interest be deemed an "estate" or a complex chose in action (*Cf.* Stone, J., in *Senior* v. *Braden,* 295 U. S. 422) is not material here, since the chose in action is equally a present right *quasi* "property" and immediately assignable; but the holding of that case is that it is an estate, and the point was material to the decision of that case. That equitable choses in action are assignable will not be questioned. It is common legal knowledge that, as Dean Stone said at page 475 of the 17th Columbia Law Review:

> "Equitable rights have always been regarded by courts of equity as freely transferable and, so far as expedient, they have been likened to legal interests which could be created or transferred by the *cestui* in the same way as the legal owner could create or transfer rights from his legal ownership."

Then, regarding the present petitioner's position as *cestui* as the proprietorship of a complex chose in action, what he did was to pass the rights presently and irrevocably to his assignee. What passed was the presently existing assignable right or interest. What distinguishes *Lucas* v.

Earl (281 U. S. 111) is precisely the absence of any corresponding fact in that case. (See *Commissioner* v. *Field*, 42 Fed. [2d] at page 822, where this is pointed out as quoted *infra*. And see *infra*, pages 8 and 9.)

III.

The Court below has erred in holding the income concerned taxable to the assignor.

The reason is, that not future income, but a present *interest*, or "legal unit of right", passed by the assignment, and the income goes to the assignee by virtue of that "property right belonging to the beneficiary" [assignee], who had become beneficiary *pro tanto* by virtue of the assignment. (Quotations from *United States* v. *Fidelity Trust Co., supra; Maguire* v. *Trefry, supra.*) Therefore the assignor had nothing to do with that income and so it can not be taxed to him. This the Circuit Court of Appeals for the Second Circuit squarely held in *Commissioner* v. *Field* (42 Fed. [2d] 820). There, in distinguishing the line of cases dealing with attempts to deflect income by anticipatory dealings with the income, which line of cases culminated in *Lucas* v. *Earl* (281 U. S. 111), Learned Hand, J., said for the court:

> "* * *. These were, however, all cases in which, though the instrument *affected* to convey an existing interest in property, there was none at the time which the law recognized. We do not understand that, where there are such, they may not be assigned like other property, *or that, when they have been, the income is still taxable to the assignor.*" (Italics ours.)

It is, indeed, hard to see how, where an assignable estate, interest, or right, which is in present existence as a "legal unit of right", is presently assigned, the income thereafter

accruing through it, and payable to its then owner, the assignee, can be taxed to the assignor. To do that would be to tax one man in respect of what is another's; and that, surely, even if the act assumed to do it, the Due-process Clause would not admit of.

IV.

The distinction is clear and broad between the present case and those cases including *Lucas* v. *Earl* where assignments of present effect in form have been held not to divert the accrual of taxable income because they were in effect mere anticipatory arrangements relating to future income.

Rosenwald v. *Commissioner*, 33 Fed. [2d] 423 may be compared with the present case for effective illustration. In the *Rosenwald* case, the taxpayer had a present property in the shape of shares of stock. In the present case the taxpayer had a present property in the shape of a beneficial estate. In the *Rosenwald* case the taxpayer had prospective income in the shape of future dividends. In the present case the taxpayer had prospective income in the shape of future distributable trust income. In the *Rosenwald* case the taxpayer *did not assign any share*. In the present case the taxpayer *did assign part of his beneficial estate*. And that is the vital difference. The taxpayer in the *Rosenwald* case tried to pass the prospective income while retaining the present property, so that the assignee must receive the income when it came due under and through his assignor's retained right represented by the shares; the dividends had to be declared on the assignor's shares in order for the assignee's claim to the income to attach, and the right of the assignee to the dividends depended on their accruing upon the assignor's property. In the present case the taxpayer did not try to pass the prospective income while re-

taining the present property, but, on the contrary, parted with "a part of the interest of Edward Tyler Blair in "said trust estate", and thenceforth the assignee's right to the trust income depended on its accruing upon the assignee's property. And this illustrates the basic distinction underlying all the cases of attempts to dispose presently of income to fall due later.

This contrast makes it clear that the transaction in the present case was not an anticipatory arrangement at all, but a present deed. In *Lucas* v. *Earl, supra,* the importance of this is shown by the words of this court *per* Holmes, J. There husband and wife mutually agreed that future acquisitions of each including earnings should be the joint property of both, and it was held that the husband's earnings thereafter received should be taxed as wholly his income. The contract was binding but executory. The earnings must accrue by virtue of the husband's rights as employee in order for the right of the wife to attach. Thus in *Poe* v. *Seaborn* (282 U. S. 101) this court said at page 117, with reference to *Lucas* v. *Earl:*

> "The very assignment in that case was bottomed on the fact that the earnings would be the husband's property, else there would have been nothing on which it could operate."

And in *Lucas* v. *Earl,* at pages 114 and 115, this is said:

> "* * *. There is no doubt that the statute could tax salaries to those who earned them and provide that the tax could not be escaped by anticipatory arrangements and contracts however skillfully devised to prevent the salary when paid from vesting even for a second in the man who earned it. That seems to us the import of the statute before us and we think that no distinction can be taken according to the motives leading to the arrangement by which the fruits are attributed to a different tree from that on which they grew."

In the present case, there was no "anticipatory arrangement" touching income. A present right or interest was presently transferred. That right or interest was the tree on which the fruits in question grew. What we are insisting on is precisely that they be attributed to the tree on which they grew. The assignee received those fruits, thereby harvesting them from that tree, which already was his own.

Respectfully submitted,

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New York, N. Y.

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IN THE

Supreme Court of the United States

October Term, 1936.

No. 247

EDWARD T. BLAIR, *Petitioner,*

v.

GUY T. HELVERING, Commissioner of Internal Revenue.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

BRIEF AMICUS CURIAE.

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On Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

BRIEF AMICUS CURIAE.

Comes now the undersigned, a member of the Bar of this Court, and moves for leave to file instanter the annexed brief as *amicus curiae*.

The requisite consents have been filed with the Clerk.

JOHN E. HUGHES,
First National Bank Building,
Chicago,
Amicus Curiae.

May It Please The Court:

In this brief we pass the question of *res adjudicata* because it is an affirmative defense such as is required by Rule 14 of the Board of Tax Appeals to be pleaded. *(Reserve Natural Gas Co., 15 B. T. A. 951, 953.)* The Commissioner could have amended his answer before the Board of Tax Appeals and set it up but he did not do so. Consequently the Board did not consider it and the Circuit Court of Appeals could not have held that the Board committed error by failure to consider of its own motion a defense not raised before it. *Helvering v. Salvage, 297 U. S. 106,* at p. *109.*

In this brief the arguments in the *amicus curiae* brief filed on the petition for the writ are not repeated but the Court is referred to that.

THE DECISION OF THE ILLINOIS APPELLATE COURT DETERMINES TO WHOM THE INCOME BELONGS AND HENCE CANNOT BE DISREGARDED BY THE FEDERAL COURTS IN A TAX CASE.

In *Hoeper v. Tax Commission of Wisconsin, 284 U. S. 206,* this Court held that a statute which taxed a husband on the income of his wife was unconstitutional. It follows that if the statute in the case at bar taxes the petitioner on the income of his children it is unconstitutional. So long as State Court decisions, which are binding on all the parties concerned, determine between them who is the owner of income, those decisions cannot be disregarded by the Federal Courts in tax cases. When a State Court renders a conclusive adjudication between A and B, holding

that certain income is the income of B, it is thereby settled that the income is B's income and not A's income, regardless of what may be held by a Federal Court in a tax case. Inasmuch as one person cannot be taxed on the income of another it follows that the Federal Courts cannot disregard a State Court decision which conclusively adjudicates the question to whom income belongs. When the State Court decision has become final it must be followed, right or wrong. Otherwise A will be taxed on the income of B. Besides in many cases not only will all A's income be confiscated but he will be liable for more than he has.

Suppose the income of a trust in the hands of a trustee is $1,000,000. Since these assignments have been made tax rates have progressively increased until at 1936 rates the tax on $1,000,000 is $681,000. If one was entitled to all the income from a trust but years previously by a valid assignment has given away one-half of his interest, he is not entitled to receive more than $500,000 and if that is all the income he has, it is impossible for him to pay the $681,000 tax. An absurd result should be avoided for, as this Court has said, "taxation is eminently practical". If taking all a taxpayer has is confiscation, certainly a construction which may take more than he has is worse.

THE PETITIONER IS NOT A BENEFICIARY WITHIN THE MEANING OF THE STATUTE.

Where statutory construction becomes necessary the established rule is that the statute must be strictly construed against the Government and liberally in favor of the taxpayer and that all doubts must be resolved in favor of the taxpayer. *(Crooks v. Harrelson, 282 U. S. 55, 61.)*

The statute quoted on page 44 of the respondent's brief provides for the taxation of all the income to the fiduciary but allows as a deduction the income:

> "which is to be distributed currently by the fiduciary to the beneficiaries * * * but the amount so allowed as a deduction shall be included in computing the net income of the beneficiaries, whether distributed to them or not."

To whom is the fiduciary to distribute the income in dispute? The fiduciary asked the Courts of Illinois to answer that question and they decided that the fiduciary was to distribute it to the children of petitioner and not to petitioner. Those having the benefit of the income are the beneficiaries.

By the assignments petitioner abdicated as a beneficiary of the interest assigned. Having abdicated he was no longer a beneficiary but the children were substituted as beneficiaries. It is as logical to say that the petitioner was a beneficiary as it is to say that the man for whom a batter in a baseball game is substituted is really the batter instead of his substitute.

On page 40 of his brief respondent says:

> "There is nothing in the other cases cited by petitioner which may be construed as permitting the taxation of trust income to anyone other than the beneficiary receiving it."

In this case we contend that the beneficiaries receiving the trust income who have paid the tax, are the ones who are taxable within the meaning of the statute. The contention is that petitioner could not have received it at any time during the taxable year.

The partnership case of *Burnet v. Leininger, 285 U. S. 136,* cited by respondent, is distinguishable because there

the assignment did not substitute the assignee as a member of the partnership and could not legally do so. In the case at bar the Appellate Court of Illinois has decided that the assignment substituted the children as beneficiaries and could legally do so. It ordered the trustees to pay the money to the children and not to petitioner.

The situation of the Government being bound by cases in State Courts to which it is not a party is no different than the situation of thousands of taxpayers who are bound by decisions in litigation between the Commissioner and a private party, such as the litigation in the case at bar, to which litigation they are not parties and in which they have no opportunity to be heard. It is the old continental argument against the precedent system of English law.

The Government has also suggested that its right to collect revenue should not be governed by private agreements but the gift tax law recognizes the right to make a gift and the right to make a gift or create a trust whereby the tax liability of the donor is affected has always been recognized.* Petitioner merely exercised his undoubted

* At pages 51 to 53 of its brief in the **Tex-Penn Oil case** the Government argues that if stock cannot be sold and thus has no market value because it is received by a taxpayer subject to a legally binding agreement preventing its sale, the agreement should be disregarded. This argument is made in the face of the fact that it can be determined to have a market value only by disregarding the agreement and that the statute does not tax it unless it has a market value. When the same argument was made with respect to a stock restriction in the case of **Attorney General of Ireland v. Jameson (1904), 2 Ir. R. K. B. 644**, the Judges in delivering their opinions at pages **674, 680** and **681**, answered it by saying it was a complaint which might be appropriately addressed to Parliament but not to the Court. (See also the decision of the Court of Appeal of England in **In Re Paulin, 104 L. J. R. 124 (1935)**). The case of **Helvering v. Salvage, 297 U. S. 106**, holding at page **109** that stock subject to an option restriction could not be valued for income tax purposes in excess of the restricted price, regardless of the price at which unrestricted shares of the same stock were selling, is utterly inconsistent with this argument of the Government.

right to make a gift of his interest in the trust. Certainly he cannot be taxed during a taxable year on what he gave away prior to the taxable year.

CONCLUSION.

In the case at bar the Appellate Court decided that petitioner had validly assigned the income before he received it. Under that decision he can never receive it and was not entitled to receive it in the same way that if Your Honor has an annuity and gives it away today you are not entitled to receive it in future years. In such case it is not your income and it was not petitioner's income, and under the Sixteenth and Fifth Amendments it is submitted no one can be taxed on any income except his own. The cases upon which the Government relies recognize this but in those cases the income was held to first accrue to the taxpayer during the taxable year and before it passed to his assignees. Here the Appellate Court of Illinois stated the question was whether petitioner could assign the income "before he received it" and decided that he could. The opinion of the Appellate Court is as much a part of its mandate as if it were set out *verbatim* therein. *Metropolitan Company v. Kaw Valley District, 223 U. S.* at p. *523.*

All of which is respectfully submitted.

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SUPREME COURT OF THE UNITED STATES.

No. 247.—October Term, 1936.

Edward T. Blair, Petitioner, *vs.* Commissioner of Internal Revenue.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

[February 1, 1937.]

Mr. Chief Justice Hughes delivered the opinion of the Court.

This case presents the question of the liability of a beneficiary of a testamentary trust for a tax upon the income which he had assigned to his children prior to the tax years and which the trustees had paid to them accordingly.

The trust was created by the will of William Blair, a resident of Illinois who died in 1899, and was of property located in that State. One-half of the net income was to be paid to the donor's widow during her life. His son, the petitioner Edward Tyler Blair, was to receive the other one-half and, after the death of the widow, the whole of the net income during his life. In 1923, after the widow's death, petitioner assigned to his daughter, Lucy Blair Linn, an interest amounting to $6000 for the remainder of that calendar year, and to $9000 in each calendar year thereafter, in the net income which the petitioner was then or might thereafter be entitled to receive during his life. At about the same time, he made like assignments of interests, amounting to $9000 in each calendar year, in the net income of the trust to his daughter Edith Blair and to his son, Edward Seymour Blair, respectively. In later years, by similar instruments, he assigned to these children additional interests, and to his son William McCormick Blair other specified interests, in the net income. The trustees accepted the assignments and distributed the income directly to the assignees.

The question first arose with respect to the tax year 1923 and the Commissioner of Internal Revenue ruled that the income was taxable to the petitioner. The Board of Tax Appeals held the contrary. 18 B. T. A. 69. The Circuit Court of Appeals reversed the Board, holding that under the law of Illinois the trust was a spend-

thrift trust and the assignments were invalid. *Commissioner* v. *Blair*, 60 F. (2d) 340. We denied certiorari. 288 U. S. 602.

Thereupon the trustees brought suit in the Superior Court of Cook County, Illinois, to obtain a construction of the will with respect to the power of the beneficiary of the trust to assign a part of his equitable interest and to determine the validity of the assignments he had made. The petitioner and the assignees were made defendants. The Appellate Court of Illinois, First District, after a review of the Illinois decisions, decided that the trust was not a spendthrift trust and upheld the assignments. *Blair* v. *Linn*, 274 Ill. App. 23. Under the mandate of the appellate court, the Superior Court of Cook County entered its decree which found the assignments to be "voluntary assignments of a part of the interest of said Edward Tyler Blair in said trust estate" and as such adjudged them to be valid.

At that time there were pending before the Board of Tax Appeals proceedings involving the income of the trust for the years 1924, 1925, 1926 and 1929. The Board received in evidence the record in the suit in the state court and, applying the decision of that court, the Board overruled the Commissioner's determination as to the petitioner's liability. 31 B. T. A. 1192. The Circuit Court of Appeals again reversed the Board. That court recognized the binding effect of the decision of the state court as to the validity of the assignments but decided that the income was still taxable to the petitioner upon the ground that his interest was not attached to the corpus of the estate and that the income was not subject to his disposition until he received it. *Commissioner* v. *Blair*, 83 F. (2d) 655, 662.

Because of an asserted conflict with the decision of the state court, and also with decisions of circuit courts of appeals, we granted certiorari. October 12, 1936.

First.—The Government contends that the judgment relating to the income for 1923 is conclusive in this proceeding as *res judicata*. *Tait* v. *Western Maryland Rwy. Co.*, 289 U. S. 620. Petitioner insists that this question was not raised before the Board of Tax Appeals and hence was not available before the Circuit Court of Appeals. *General Utilities Co.* v. *Helvering*, 296 U. S. 200, 206; *Helvering* v. *Savage*, 297 U. S. 106, 109. The Government responds that the answers before the Board of Tax Appeals in the instant case had been filed before the first decision of the Circuit Court

of Appeals was entered, and that, while the case was heard before the Board without amended pleadings, the whole matter was actually before the Board and the question of *res judicata* was raised by an assignment of error on the petition for review before the Circuit Court of Appeals.

It is not necessary to review the respective contentions upon this point, as we think that the ruling in the *Tait* case is not applicable. That ruling and the reasoning which underlies it apply where in the subsequent proceeding, although relating to a different tax year, the questions presented upon the facts and the law are essentially the same. *Tait* v. *Western Maryland Rwy. Co., supra,* pp. 624, 626. Here, after the decision in the first proceeding, the opinion and decree of the state court created a new situation. The determination of petitioner's liability for the year 1923 had been rested entirely upon the local law. *Commissioner* v. *Blair,* 60 F. (2d) 340, 342, 344. The supervening decision of the state court interpreting that law in direct relation to this trust cannot justly be ignored in the present proceeding so far as it is found that the local law is determinative of any material point in controversy. Compare *Freuler* v. *Helvering,* 291 U. S. 35; *Hubbell* v. *Helvering,* 70 F. (2d) 668.

Second.—The question of the validity of the assignments is a question of local law. The donor was a resident of Illinois and his disposition of the property in that State was subject to its law. By that law the character of the trust, the nature and extent of the interest of the beneficiary, and the power of the beneficiary to assign that interest in whole or in part, are to be determined. The decision of the state court upon these questions is final. *Spindle* v. *Shreve,* 111 U. S. 542, 547, 548; *Uterhart* v. *United States,* 240 U. S. 598, 603; *Poe* v. *Seaborn,* 282 U. S. 101, 110; *Freuler* v. *Helvering, supra,* p. 45. It matters not that the decision was by an intermediate appellate court. Compare *Graham* v. *White-Phillips Co.,* 296 U. S. 27. In this instance, it is not necessary to go beyond the obvious point that the decision was in a suit between the trustees and the beneficiary and his assignees, and the decree which was entered in pursuance of the decision determined as between these parties the validity of the particular assignments. Nor is there any basis for a charge that the suit was collusive and the decree inoperative. *Freuler* v. *Helvering, supra.* The trustees were entitled to seek the instructions of the court having supervision of the trust. That

court entertained the suit and the appellate court, with the first decision of the Circuit Court of Appeals before it, reviewed the decisions of the Supreme Court of the State and reached a deliberate conclusion. To derogate from the authority of that conclusion and of the decree it commanded, so far as the question is one of state law, would be wholly unwarranted in the exercise of federal jurisdiction.

In the face of this ruling of the state court it is not open to the Government to argue that the trust "was, under the Illinois law, a spendthrift trust." The point of the argument is that, the trust being of that character, the state law barred the voluntary alienation by the beneficiary of his interest. The state court held precisely the contrary. The ruling also determines the validity of the assignment by the beneficiary of parts of his interest. That question was necessarily presented and expressly decided.

Third.—The question remains whether, treating the assignments as valid, the assignor was still taxable upon the income under the federal income tax act. That is a federal question.

Our decisions in *Lucas* v. *Earl,* 281 U. S. 111, and *Burnet* v. *Leininger,* 285 U. S. 136, are cited. In the *Lucas* case the question was whether an attorney was taxable for the whole of his salary and fees earned by him in the tax years or only upon one-half by reason of an agreement with his wife by which his earnings were to be received and owned by them jointly. We were of the opinion that the case turned upon the construction of the taxing act. We said that "the statute could tax salaries to those who earned them and provide that the tax could not be escaped by anticipatory arrangements and contracts however skilfully devised to prevent the same when paid from vesting even for a second in the man who earned it". That was deemed to be the meaning of the statute as to compensation for personal service and the one who earned the income was held to be subject to the tax. In *Burnet* v. *Leininger, supra,* a husband, a member of a firm, assigned future partnership income to his wife. We found that the revenue act dealt explicitly with the liability of partners as such. The wife did not become a member of the firm; the act specifically taxed the distributive share of each partner in the net income of the firm; and the husband by the fair import of the act remained taxable upon his distributive share. These cases are not in point. The tax here is not upon earnings which are taxed to the one who earns them. Nor is it a

case of income attributable to a taxpayer by reason of the application of the income to the discharge of his obligation. *Old Colony Trust Company* v. *Commissioner,* 279 U. S. 716; *Douglas* v. *Willcuts,* 296 U. S. 1, 9; *Helvering* v. *Stokes,* 296 U. S. 551; *Helvering* v. *Schweitzer,* 296 U. S. 551; *Helvering* v. *Coxey,* 297 U. S. 694. See, also, *Burnet* v. *Wells,* 289 U. S. 670, 677. There is here no question of evasion or of giving effect to statutory provisions designed to forestall evasion; or of the taxpayer's retention of control. *Corliss* v. *Bowers,* 281 U. S. 376; *Burnet* v. *Guggenheim,* 288 U. S. 280.

In the instant case, the tax is upon income as to which, in the general application of the revenue acts, the tax liability attaches to ownership. See *Poe* v. *Seaborn, supra; Hoeper* v. *Tax Commission,* 284 U. S. 206.

The Government points to the provisions of the revenue acts imposing upon the beneficiary of a trust the liability for the tax upon the income distributable to the beneficiary.[1] But the term is merely descriptive of the one entitled to the beneficial interest. These provisions cannot be taken to preclude valid assignments of the beneficial interest, or to affect the duty of the trustee to distribute income to the owner of the beneficial interest, whether he was such initially or becomes such by valid assignment. The one who is to receive the income as the owner of the beneficial interest is to pay the tax. If under the law governing the trust the beneficial interest is assignable, and if it has been assigned without reservation, the assignee thus becomes the beneficiary and is entitled to rights and remedies accordingly. We find nothing in the revenue acts which denies him that status.

The decision of the Circuit Court of Appeals turned upon the effect to be ascribed to the assignments. The court held that the petitioner had no interest in the corpus of the estate and could not dispose of the income until he received it. Hence it was said that "the income was *his*" and his assignment was merely a direction to pay over to others what was due to himself. The question was considered to involve "the date when the income became transferable". 83 F. (2d), p. 662. The Government refers to the terms of the assignment,—that it was of the interest in the income "which the said party of the first part now is, or may hereafter be, entitled to receive during his life from the trustees". From this it is urged

[1] Revenue Acts of 1921, sec. 219 (a) (d); 1924 and 1926, sec. 219 (a) (b); 1928, sec. 162 (a) (b).

that the assignments "dealt only with a right to receive the income" and that "no attempt was made to assign any equitable right, title or interest in the trust itself". This construction seems to us to be a strained one. We think it apparent that the conveyancer was not seeking to limit the assignment so as to make it anything less than a complete transfer of the specified interest of the petitioner as the life beneficiary of the trust, but that with ample caution he was using words to effect such a transfer. That the state court so construed the assignments appears from the final decree which described them as voluntary assignments of interests of the petitioner "in said trust estate", and it was in that aspect that petitioner's right to make the assignments was sustained.

The will creating the trust entitled the petitioner during his life to the net income of the property held in trust. He thus became the owner of an equitable interest in the corpus of the property. *Brown* v. *Fletcher,* 235 U. S. 589, 598, 599; *Irwin* v. *Gavit,* 268 U. S. 161, 167, 168; *Senior* v. *Braden,* 295 U. S. 422, 432, 433; *Merchants' Loan & Trust Co.* v. *Paterson,* 308 Ill. 519, 530. By virtue of that interest he was entitled to enforce the trust, to have a breach of trust enjoined and to obtain redress in case of breach. The interest was present property alienable like any other, in the absence of a valid restraint upon alienation. *Commissioner of Internal Revenue* v. *Field,* 42 F. (2d) 820, 822; *Shanley* v. *Bowers,* 81 F. (2d) 13, 15. The beneficiary may thus transfer a part of his interest as well as the whole. See Restatement of the Law of Trusts, secs. 130, 132 *et seq.* The assignment of the beneficial interest is not the assignment of a chose in action but of the "right, title and estate in and to property". *Brown* v. *Fletcher, supra; Senior* v. *Braden, supra.* See Bogert, "Trusts and Trustees", vol. 1, sec. 183, pp. 516, 517; 17 Columbia Law Review, 269, 273, 289, 290.

We conclude that the assignments were valid, that the assignees thereby became the owners of the specified beneficial interests in the income, and that as to these interests they and not the petitioner were taxable for the tax years in question. The judgment of the Circuit Court of Appeals is reversed and the cause is remanded with direction to affirm the decision of the Board of Tax Appeals.

It is so ordered.